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Jan 13

St. Brit. Court of
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THE

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EXCHEQUER REPORTS.

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

Courts of Exchequer & Exchequer Chamber.

VOL. VIII.

TRINITY VACATION, 15 VICT. to TRINITY TERM, 16 VICT.
BOTH INCLUSIVE.

BY

W. N. WELSBY, OF THE MIDDLE TEMPLE,
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JUDGES
OF THE
COURT OF EXCHEQUER,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Right Honourable Sir FREDERICK POLLOCK, Knt., Chief Baron.

BARONS.

The Right Honourable Sir JAMES PARKE, Knt.
Sir EDWARD HALL ALDERSON, Knt.
Sir THOMAS JOSHUA PLATT, Knt.
Sir SAMUEL MARTIN, Knt.

ATTORNEYS-GENERAL { **Sir FREDERICK THESIGER, Knt.**
 { **Sir ALEXANDER JAMES EDMUND COCKBURN, Knt.**

SOLICITORS-GENERAL { **Sir FITZBOY KELLY, Knt.**
 { **Sir RICHARD BETHELL, Knt.**

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TRINITY VACATION, 16 VICT.

1852.

BROWN and Others v. NORTH and Another.

June 19th.

BY a Judge's order, made by consent, under the 3 & 4 Will. 4, c. 42, s. 25, the following case was stated for the opinion of this Court:—

The plaintiffs are merchants, carrying on business at Liverpool, under the firm of Brown, Shipley, & Co., and

S., a partner in a firm at Liverpool, and sole owner of the ship "Ellen," entered into an arrangement, by which the "Ellen" was, in 1850 and 1851,

consigned, during several voyages, to H., a partner in the firm of H. & C. H., at New Orleans, with general instructions to do the best he could, either in loading the vessel on freight, or shipping cotton, on the joint account of S. and H. On those occasions, as is usual when cotton is shipped on account of the shipowner, a nominal freight, or "no freight, being owner's property," was inserted in the bills of lading; but, in stating the partnership accounts in respect of the sale of the cotton, the current rate of freight was charged in favour of S., and to the debit of the joint adventure. On the 4th of April, 1851, S. wrote to H. in these terms:—"We hope you have bought cotton, and that the 'Ellen' has arrived. What you do, we will confirm." Again, on the 26th of April:—"Whatever you do for the 'Ellen' will be confirmed by us." On the 8th of May, 1851, H. & C. H. shipped on board the "Ellen" 447 bales of cotton; and the master signed a bill of lading, by which the cotton was "to be delivered unto order or to assigns, he or they paying freight for the said cotton 1s. per bale, being owner's property, when draft against same is paid, say 3590*l.* 9*s.* 8*d.*, with primage and average accustomed." On the 15th of May, H. & C. H. again shipped 381 bales of cotton, and a similar bill of lading was signed by the master. The draft for 3590*l.* 9*s.* 8*d.*, dated 8th of May, 1851, was for the invoice price of the cotton, and was on the firm of which S. was a partner, and was purchased, on the day of its date, by the plaintiffs, merchants at New Orleans, who took, at the same time, from the shippers, an indorsement in blank of the first bill of lading, as a security for the due payment of the draft. A bill of exchange, dated 15th of May, 1851, for 3169*l.* 19*s.* 3*d.*, was in like manner drawn for the price of the cotton in the second bill of lading; and that bill of exchange was also purchased by the plaintiffs, the second bill of lading being also indorsed to them. In both cases the cotton was purchased of third persons, and not of the plaintiffs. These bills, when due, were dishonoured by S., and taken up by the plaintiffs. On the 10th of May, 1851, S., being indebted to the defendants, assigned to them the "Ellen" by way of mortgage, with all her freight and earnings, with power of sale and authority to receive freight. The "Ellen" arrived at Liverpool on the 28th of July, 1851, when the defendants took possession of her and her cargo, and claimed from the plaintiffs, as indorsees of the bills of lading, payment of the current rate of freight. The plaintiffs tendered the amount of freight reserved by the bills of lading, which being refused, they paid the amount claimed, under protest, and brought this action for money received to their use:—*Held*, that the plaintiffs were entitled to recover, since the circumstances shewed a clear authority from S. to H. to ship the cotton upon the terms of the bills of lading; and although the second of those bills was signed after the mortgage, yet it did not invalidate the transaction as against the plaintiffs, who took the bills *bonâ fide* and without notice.

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at New Orleans, under the firm of Samuel Nicholson & Co. This is an action on promises for money paid, had, and received, &c., to which the defendants have pleaded the general issue. The action is brought to recover back money paid to the defendants under protest by the plaintiffs, as indorsees of two bills of lading of cotton, shipped by Messrs. Henry & Charles Holland on board the ship "Ellen," William Sheppard, master, at New Orleans, for Liverpool. One of the bills of lading is dated 7th May, 1851, and is for 447 bales, to be delivered unto "order or to assigns, he or they paying freight for the said cotton one shilling per bale, being owner's property, when draft against same is paid, say 3590*l.* 9*s.* 8*d.*, with primage and average accustomed." The other bill of lading is dated 15th of May, 1851, and is for 381 bales, to be delivered unto "order or to assigns, he or they paying freight for the said cotton at the rate of one shilling per bale, with primage and average accustomed." Both bills of lading were signed by the master.

The cotton mentioned in the two bills of lading was purchased by the shippers, for the purpose of shipping it on joint account of Mr. Henry Holland of New Orleans, and Mr. William Stock of Liverpool, the latter trading under the firm of Thomas & William Stock. Mr. Stock was the sole registered owner of the ship. It is usual, where cotton is shipped on account of the ship owner, to insert in the bills of lading a nominal freight or "freight at no rate, being owner's property," and in such cases the shipper is enabled to sell bills drawn against the shipment upon better terms, or to obtain a larger advance, than where full freight is charged.

Mr. Henry Holland being in England in the autumn of 1849, Mr. Stock arranged with him to send the "Ellen" to his consignment at New Orleans, with general instructions to do the best he could for the vessel, either in loading her on freight, or shipping cotton on joint account of Mr. Stock and Mr. Holland.

In the years 1850 and 1851, the "Ellen" performed three voyages between New Orleans and Liverpool. On each of these voyages Mr. Holland made various shipments of cotton on joint account of himself and Mr. Stock, and the bills of lading were filled up in manner following: [The case then set out several bills of lading, some of which were "no freight, being owner's property, when draft favour," and others "no freight, being on account of owners of said vessel."]

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In stating the partnership accounts as between themselves, the current rate of freight was charged in the account sales of the cotton in favour of Mr. Stock, and to the debit of the joint adventures. The shipments in question in this cause were made upon the third of the said voyages. With reference to the loading of the "Ellen" during the two previous voyages, (amongst other correspondence), on 16th April, 1850, Mr. Holland wrote to Mr. Stock as follows:—"I have also to advise that, under the date of the 9th instant, I drew upon you at sixty days sight in favour of Samuel Nicholson, for 4496*l*. 13*s*. 6*d*. sterling, against 401 bales cotton per 'Ellen;' and this day I have drawn upon you at sixty days sight in favour of Samuel Nicholson & Co., for 3976*l*. 15*s*., against 331 bales cotton, which please accept on presentation. The bills of lading accompany the bills." Again, on the 18th of April, 1850, "The bills of lading for the cotton are filled up without freight, but in the account sales you will charge the current rate of 1*s*. 4*d*. per lb." On the 13th of October, 1850, Mr. Holland wrote so Mr. Stock as follows: "We have made further purchases on our joint account, say to the extent of 195 Ba., by picking up small lots, wherever we could find the cheapest cotton. We succeeded in being able to negotiate upon you to this extent by giving B./L. at no freight, but we doubt much if we can go further; there seems to be an objection in taking bills upon you over this

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extent, and in fact we are obliged to give security for what we have already done."

The following (amongst other) correspondence subsequently passed between Mr. Stock and Mr. Holland before the date of the mortgage after mentioned. On the 28th of March, 1851, Mr. Stock wrote to Mr. Holland—"We hope the 'Ellen' will arrive in time for a big freight. If you buy cotton, and freights go down, it will do well, as our market is considerably better." Again, on the 4th of April, 1851—"We hope you have bought cotton, and that the 'Ellen' has arrived. What you do we will confirm." Again, on the 26th of April, "Whatever you do for the 'Ellen,' will be confirmed by us." On the 3rd of May, 1851, Mr. Holland wrote to Mr. Stock: "We have now to advise that we have purchased, on joint account of yourselves and the writer, 234 bales cotton at 9½d., 42 bales at 9d., 151 bales at 8d., and 24 bales at 8½d. per lb., together 451 bales, which we are shipping on board the 'Ellen.' We think we shall continue our shipments to a further extent during the coming week."

Unless as appears from the facts above stated, and the course of dealing to be implied therefrom, Mr. Holland received from Mr. Stock no authority to fill up the bills of lading in question in the manner before set out, nor had the defendants any knowledge, until after the arrival of the "Ellen" in England from the voyage in question, of the facts and correspondence in reference to the purchase and loading of the cotton on any of the three voyages.

The draft for 3590*l.* 9*s.* 8*d.*, referred to in the first bill of lading, was a bill for that amount, being for the invoice price of the cotton mentioned in the first bill of lading, dated the 8th of May, 1851, drawn by the shippers upon the firm of Thomas & William Stock, and was purchased on its date by the plaintiffs' house at New Orleans, who at the same time took from the shippers the first bill of lading indorsed in blank, as security for the due payment of the

draft. The shippers also drew a bill, dated the 15th of May, 1851, for 3169*l.* 19*s.* 3*d.*, being for the invoice price of the cotton mentioned in the second bill of lading, and this bill was in like manner purchased by the plaintiffs, who at the same time took the second bill of lading indorsed in blank as security for due payment thereof. In both cases the cotton was purchased from third persons, and not from the plaintiffs.

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These bills of exchange were drawn and negotiated, and the bills of lading were indorsed to secure the same as aforesaid, in the usual course of business. Both bills were accepted by Mr. Stock under the name and style of his said firm, but were dishonoured and protested for non-payment, and were at maturity, and before the commencement of this action, taken up by the plaintiffs, who are now the holders thereof. After the date of the first bill of lading, but before the date of the second, Mr. Stock, being largely indebted to the defendants, by bill of sale, dated the 10th of May, 1851, assigned to the defendants by way of mortgage, with powers of sale for raising and securing payment of the debt, the entirety of the said ship, "and all and singular the freight and earnings of the said vessel during the continuance of this security, and all policies of insurance, charter-parties, bills of lading, and all other securities for or relating to the same; with full power and authority for the said R. F. North and J. Hobson, as the attorneys hereby irrevocably appointed of the said W. Stock, to ask, demand, sue for, recover, and receive the said freight and earnings hereby assigned, and to give good and sufficient discharges." At the time of negotiating this mortgage, Mr. Stock stated to the defendants that he expected the freight of the "Ellen" would amount to 1400*l.* or 1500*l.* If freight at the current rate had been charged upon the two shipments in question, the amount would have been 652*l.* 1*s.* The actual freight earned upon other goods carried upon the same voyages was 495*l.* 11*s.*

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The "Ellen" arrived at Liverpool on the 28th of July, 1851, and the defendants immediately took possession of her and her cargo, and claimed payment from the plaintiffs, as consignees of the said cotton, of freight thereon according to the current rate, with primage thereon, viz., 352*l.* 0*s.* 3*d.*, in respect of the 447 bales comprised in the first bill of lading, and 300*l.* 0*s.* 9*d.*, in respect of the 381 bales comprised in the second bill of lading; which sums respectively it is admitted would be a reasonable freight, with primage thereon, if taken irrespective of the rate of freight mentioned in the bills of lading.

The plaintiffs tendered to the defendants, in respect of the cotton comprised in the first bill of lading, the sum of 23*l.* 9*s.* 5*d.*, and in respect of the cotton comprised in the second bill of lading, the sum of 20*l.* 0*s.* 1*d.*, such sums being the amount of freight, with primage thereon, according to the said rate of one shilling per bale, specified in the bills of lading respectively; and they demanded the delivery of the said cotton: but the defendants refused to deliver the same without payment of the said sums of 352*l.* 0*s.* 3*d.* and 300*l.* 0*s.* 9*d.*; which sums were thereupon paid to them by the plaintiffs under protest, and in order to obtain delivery of the cotton.

The plaintiffs, before the commencement of this action, made separate demands upon the defendants for the payment of the sums of 328*l.* 10*s.* 10*d.* and 280*l.* 0*s.* 8*d.* respectively, being the amounts which they claim as having been overpaid in respect of freight and primage on the said cotton. The defendants refused to pay the said sums, or any part thereof.

The question for the opinion of the Court is, whether the plaintiffs are entitled to the sums so demanded, or either of them, or any part of the same respectively. If the Court should be of opinion that the plaintiffs are entitled to recover, then the defendants are to withdraw their plea, and judgment is to be entered for the plaintiffs

by nil dicit, for such amount as the Court shall determine. If the Court should be of opinion that the plaintiffs are not entitled to recover any part of the money so paid by them, then a nolle prosequi is to be entered by the plaintiffs.

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Cowling argued for the plaintiffs in last Trinity Term (June 2 and 7).—The plaintiffs are entitled to recover the two sums in question, since they were paid without consideration, and in order to obtain possession of their goods. The cotton was purchased by Messrs. Henry & Charles Holland; and therefore, at that time, it was clearly their property. No funds having been supplied to them, for the purpose of raising funds they drew two bills of exchange on Stock, the shipowner, each bill being for the amount of the invoice price of the cotton mentioned in the bills of lading. The plaintiffs purchased the bills of exchange; and the bills of lading, which were drawn so as to preserve the right of property in the shippers, were indorsed and delivered to the plaintiffs as a security for the due payment of the bills of exchange. That transaction was in accordance with the usual course of business: *Turner v. The Trustees of the Liverpool Docks* (a), *Jenkyns v. Brown* (b). Hence, the property in each cargo at the time of the shipment was in the plaintiffs, though perhaps they were merely in the situation of mortgagees, and entitled to reimburse themselves for the money advanced. Then, what rights have the defendants? That depends upon whether they have any lien on the cargoes; but they can have none, for the bills of lading reserve a certain amount of freight, and that has been paid. The bills of lading cannot be construed as meaning that the cotton was to be carried freight free, or for a nominal freight only, in the event of its becoming the owner's property;

(a) 6 Exch. 543.

(b) 19 L. J., Q. B., 286.

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since in that case all claim to freight would cease. In no view can any lien exist, for a lien could only attach in respect of the amount of freight reserved; and, admitting that the cotton was improperly shipped on these terms, that is only ground for a cross action. That Henry Holland had authority to bind Stock by entering into a contract, by which the cotton was to be delivered to a third person freight free or for a nominal freight, is evident from the letters of the 28th of March, 1851, the 4th of April, 1851, and 26th of April, 1851. The cotton was shipped on the joint account of Henry Holland and Stock; and it is no real objection, that the bills of lading made it deliverable to the order of the shippers, for that was necessary for their security, and in conformity with the established usage of trade and the previous course of dealing between the parties. [He referred to the language of former bills of lading and correspondence.] Then, if the agreement to carry "freight free" or for a nominal freight was binding on Stock, it is binding on the defendants, his mortgagees. With regard to the first cargo, the defendants can have no claim which Stock himself would not have had; for the first bill of lading was signed and the contract complete before the date of the mortgage. It is true that the other bill of lading was signed after the mortgage, but it was signed under an authority given before. The owner cannot, by mortgaging his ship, destroy the interest which he has previously created; but the mortgagee must take the property subject to all contracts and authority theretofore made or given. If a high rate of freight had been reserved by the bills of lading, could the plaintiffs have excused themselves from paying it, on the ground that the authority to make such a contract was defeated by the mortgage? Henry Holland filled two capacities; he was the partner of Charles Holland, the firm being the purchaser of the cotton which was transferred to the plain-

tiffs. He was also the joint adventurer with Stock, in which latter capacity only he agreed with him to join in payment of freight; therefore, any arrangement so made must necessarily be subservient to the rights of the plaintiffs, derived from the owners of the property.

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Mellish for the defendants.—The defendants, as mortgagees, are entitled to the freight claimed. Formerly it was considered that, where goods were shipped on board the vendee's vessel, the right of lien or stoppage in transitu was at an end; but the cases of *Van Casteel v. Booker* (a) and *Turner v. The Trustees of the Liverpool Docks* (b) shew that, notwithstanding a delivery on board the vendee's ship, the vendor may preserve his rights, by making the goods deliverable to his order or assigns. A further advantage is now sought for, viz. that an unpaid vendor should have a property in the consignment without paying any freight, for such would be the practical effect of a decision in the plaintiffs' favour. As regards the first cargo, the meaning of the contract in the bill of lading is, that the goods are to be held to the order of the shippers, until it is ascertained whether the bill of exchange drawn against the consignment is paid, and, if so, the goods are to become the property of the consignee. A nominal freight was inserted, because there was no intention that freight should be paid at all events, since the goods might become the shipowner's property; but the bills not having been paid, the property remained in the shippers, and therefore the current rate of freight was payable. It was for the benefit of the plaintiffs that they should not be obliged to pay freight before it was known whether the bills would be honoured. This point was not decided in *Turner v. The Trustees of the Liverpool Docks*, where the language of the bill of lading was "being owner's property," and not

(a) 2 Exch. 691.

(b) 6 Exch. 543.

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as here "being owner's property *when draft against same is paid.*" Those latter words shew that the parties never meant that a nominal freight only should be paid in the event of the drafts being dishonoured. The real shipper was H. Holland, on the joint account of himself and Stock, and the intention was that, if the shipowner did not get the goods, freight should be paid for the use of the ship. Assuming, however, that such is not the true construction of the bills of lading, H. Holland had no power to bind Stock by a contract that the cotton should be delivered freight free or for a nominal freight to any one but himself. Suppose Stock had paid the bills of exchange, or H. Holland had indorsed the bills of lading to him, would not the defendants, as mortgagees, have had a lien for freight as against Stock? It is clear that he, having pledged the vessel *and its earnings*, would be liable to pay freight, notwithstanding the goods were carried on his own account. Then, if so, the defendants have a lien as against H. Holland, for the correspondence shews that, as between him and Stock, freight was payable at the current rate. At all events, the defendants are entitled to freight upon the cargo mentioned in the second bill of lading, which bears date subsequently to the mortgage. A person who is sole owner of a ship and joint owner of its cargo, may, by assigning the ship, pass the right to freight as incident to the transfer. If H. Holland had indorsed the bill of lading to Stock after the mortgage, and the latter had delivered it to a third person, the mortgagees would, as against him, have had a lien for freight. Where by the terms of a charter-party certain freight is payable to a shipowner, the consignee of the vessel cannot, by signing bills of lading reserving a different amount of freight, defeat the shipowner's rights, but his lien attaches the moment the goods are put on board, even as against the indorsee of the bill of lading, whether he has had notice of the terms of the charter-party or not: *Faith v. The East*

India Company (a), Small v. Moates (b). Here the bill of lading does not disclose the true contract, which, as between H. Holland and Stock, was a partnership transaction; and it was competent for the latter to agree with the defendants to pay them freight for the cargo to be carried on board the ship which he then assigned; and such agreement, if good as against Stock, is also good as against H. Holland. The decisions with reference to bills of lading operating as an estoppel, are founded on the well-known maxim of law, that, if a person wilfully causes another to believe in the existence of a certain state of facts with a view to his acting upon them, and he in consequence does so act, the former is concluded from denying that such a state of things in reality existed: *Abbott on Shipping*, p. 323, 8th ed.; *Howard v. Tucker (c)*. That rule, however, applies only as between the shipper and the assignee of the bill of lading; but between the shipper and shipowner, the bill of lading is not conclusive: *Grant v. Norway (d)*. Here the master had no authority to sign bills of lading freight free or for a nominal freight; and there is a valid contract for freight made with the defendants, by the person who was owner of the ship and also joint owner of the cargo.

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Cowling in reply.—If the argument for the defendants were to prevail, it would impede the purchasing and shipping of cotton on behalf of shipowners. Indeed no person could safely deal with the captain of a vessel, without first inquiring whether it was mortgaged. *Turner v. The Trustees of the Liverpool Docks* introduced no new doctrine, but only confirmed the decision of this Court in *Ellershaw v. Magniac (e)*. The second bill of lading does not contain the words “being owner’s property,” which are only explan-

(a) 4 B. & Ald. 630.

(b) 9 Bing. 574.

(c) 1 B. & Ad. 712.

(d) 10 C. B. 665.

(e) 6 Exch. 570.

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atory of the reason why freight is not required, and may be rejected as surplusage. The absolute direction in the bills of lading to deliver the goods "to order or assigns" cannot be qualified by any private arrangement between the owners of the goods. Then, with regard to the second bill of lading, the mortgage gave no lien as against Stock, for there was no contract for freight irrespectively of the bill of lading, nor could any be implied. *Faith v. The East India Company*, and *Small v. Moates*, are distinguishable, because in those cases there was an express contract that the shipowner should have a lien for the chartered freight. Here the mortgage reserves no right of lien on the cargo, even if it were Stock's. Those cases, however, shew that, with respect to third persons, a bill of lading is conclusive. Moreover, the plaintiffs, who claim under Henry & Charles Holland, cannot be affected by any rights which the defendants may have against Stock, or Stock and Henry Holland. But even if the plaintiffs did claim under Stock, the authority given by him to Henry Holland could not be revoked by a mortgagee without notice. The judgment of *Bayley, J.*, in *Pope v. Biggs (a)* supports that proposition.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—This was an action for money had and received, brought to recover back money paid to the defendants under protest, in order to obtain the possession of certain bales of cotton, shipped on board the "Ellen," and brought from New Orleans to Liverpool. The plaintiffs claimed the goods as indorsees under two bills of lading. The defendants claimed to retain the goods as mortgagees of the vessel, until payment of the freight alleged to be

(a) 9 B. & C. 245.

due for the carriage of the cotton from New Orleans to Liverpool; and the question in the case is, whether the claim to freight, made by the defendants, is well founded as to both or either of the bills of lading. If it be not well founded as to both, the plaintiffs are entitled to the judgment of the Court, to the amount of the sum of money paid upon one or both of the bills of lading. If it be well founded as to both, the defendants are entitled to our judgment.

The transactions, out of which the question arose, were these:—William Stock, of Liverpool, trading under the firm of Thomas & William Stock, the sole registered owner of the “Ellen,” and Henry Holland, of New Orleans, entered into an arrangement, under which the “Ellen” was consigned, during several voyages in 1850 and 1851, to Henry Holland, with general instructions to do the best he could, either in loading the vessel on freight or shipping cotton on joint account of Stock and Holland. It is stated in the case to be usual, when cotton is shipped on account of the shipowner, to insert in the bill of lading a nominal freight, or “no freight being owner’s property.” This practice enables the shipper to sell bills drawn against the shipment upon better terms, or to obtain a larger advance than if full freight is charged; and it had obtained in several instances before the voyage in question, on the occasion of other shipments by Henry Holland on joint account of Stock and Holland. In stating the partnership accounts between themselves, the current rate of freight was charged in the account sales of the cotton in favour of William Stock, and to the debit of the joint adventure. On the 4th April, 1851, Stock wrote to Holland in these terms:—“We hope you have bought cotton, and that the ‘Ellen’ has arrived. What you do, we will confirm.” And again, on the 26th April, “Whatever you do for the ‘Ellen,’ will be confirmed by us.” The first bill of lading was dated the 8th May, 1851, and was for 447 bales of cotton, shipped by Messrs. Henry & Charles Holland, to be delivered

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unto order or to assigns, "he or they paying freight for the said cotton one shilling per bale, being owner's property, when draft against same is paid, say 3590*l.* 9*s.* 8*d.*, with primage and average accustomed." The other was dated the 15th May, 1851, and was for 381 bales, with a similar clause as to freight: these bills of lading were signed by the Master of the "Ellen." The draft for 3590*l.* 9*s.* 8*d.*, referred to in the first bill of lading, was drawn for the invoice price of the cotton in that bill of lading, dated 8th May, 1851, on the firm of Thomas & William Stock, and was purchased on the day of its date by the plaintiffs' house at New Orleans, who took at the same time from the shippers an indorsement in blank of the first bill of lading, as security for the due payment of the draft. A bill of exchange, dated 15th May, 1851, for 3169*l.* 19*s.* 3*d.*, was in like manner drawn for the price of the cotton in the second bill of lading, which bill of exchange also was purchased by the plaintiffs, the second bill of lading being in like manner indorsed to them. In both cases, the cotton was purchased of third persons, and not from the plaintiffs. These bills when due were dishonoured by Stock, and were taken up by the plaintiffs, who now hold them. On the 10th May, 1851, Stock, being largely indebted to the defendants, assigned the "Ellen" by way of mortgage, with all her freight and earnings, with power of sale, and authority to receive the freight. On the arrival of the "Ellen" (the 28th July, 1851), the defendants took possession of her and her cargo, and claimed payment of freight from the plaintiffs as consignees of the cotton. The plaintiffs tendered the freight, &c., due on the bills of lading; but the defendants refused to deliver the cotton, and demanded 352*l.* 0*s.* 3*d.* for freight of the cotton in the first bill of lading, and 300*l.* 0*s.* 9*d.* for the freight of the cotton in the second bill of lading.

The case was argued before us on the 2nd and 7th of June, by Mr. Cowling for the plaintiffs, and Mr. Mellish for the

defendants. On the part of the plaintiffs it was contended, that, as indorsees of the bills of lading, they were entitled to the goods, and upon the terms of the bills of lading, and were not liable to pay the current rate of freight, or any other freight than the bills of lading stipulated for: and the case of *Turner v. The Trustees of the Liverpool Docks* (a) was cited. For the defendants it was contended, that the goods never became the property of the shipowner, and that therefore they were liable to freight, inasmuch as the circumstance never existed upon which their non-liability to freight was made to depend: that the shipowner was to hold the cargo for the benefit of the shippers until it was ascertained that the bills of exchange would be paid; and the bills of exchange not having been paid, the property continued in the shippers, and therefore freight would be payable for all the goods; and a distinction was taken between this case and *Turner v. The Trustees of the Liverpool Docks*, as there the goods were stated to be "freight free," whereas here a certain rate of freight was stipulated for on the ground of the goods being the property of the shipowner, and that fact failing, the goods were liable to the current rate of freight, as the real shipper was Henry Holland, on the joint account of himself and Stock, or of Charles & Henry Holland. It was also contended that, as against Stock, the defendants would have had a lien, and therefore must have it against the plaintiffs. It was also argued, that there was no authority to receive goods on board with such a stipulation as to freight, as the authority was "to let the ship on freight, or ship cotton on joint account;" and at any rate, it was argued, that as the vendee of a ship is entitled to the earnings of a vessel after the sale, the defendants were entitled to freight on the goods in the second bill of lading, which was dated on the 15th of May, the transfer of the ship having been on the

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(a) 6 Exch. 543

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10th of May. But notwithstanding the ingenious argument of the learned counsel for the defendants, we are of opinion that our judgment must be for the plaintiffs in respect of both the bills of lading.

It might perhaps be sufficient to say, that in this case there is no evidence of any contract under which the defendants can claim any freight at all; but it may be more satisfactory, as the foundation of our judgment, to point out that the course of dealing between Holland and Stock on former voyages, and the usage in such matters, together with the letters from Stock, clearly make out an authority from Stock to Holland to ship the goods upon the terms of the bills of lading; and the goods in the first bill of lading are therefore clearly chargeable with the freight of 1s. per bale only; and in reality there is no difference between the second bill of lading and the first, inasmuch as the transfer of the vessel by the bill of sale would not invalidate the arrangements made by Holland with the authority of Stock, before the transfer could be known. As against Stock, the defendants might have had a claim, inasmuch as Stock had represented (when he transferred the vessel) that there would be a large sum due for freight; but this representation does not bind the plaintiffs, who were wholly ignorant of it, and who took the bills of lading *bonâ fide*, having given full value for them, which bills of lading contained a stipulated rate of freight, in accordance with the usage of trade, and fully sanctioned and authorised by the shipowner, and which stipulated freight was tendered by the plaintiffs to the defendants. For these reasons our judgment must be, as to the whole claim, for the plaintiffs.

Judgment for the plaintiffs.

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The GALVANIZED IRON COMPANY v. WESTOBY.

June 26.

DEBT against the defendant, as the holder of 100 shares in "The Galvanized Iron Company," to recover a call of 2*l.* per share, with interest.

Plea, that the defendant was not nor is the holder of the said shares, *modo et formâ*; concluding to the country.—Upon which issue was joined.

At the trial, before *Pollock*, C. B., at the London Sittings after Michaelmas Term, 1851, the following facts appeared:—In the year 1845, a joint-stock Company was projected for the purpose of mining for iron and coal, and manufacturing and galvanizing iron &c. The capital of the Company was to consist of 500,000*l.* in 50,000 shares of 10*l.* each. One hundred shares were allotted to the defendant, in pursuance of his personal request to one of the directors, and without his having sent the usual formal letter of application. The defendant duly paid the deposit upon these shares, and his name was inserted in the register of shareholders, and was also mentioned in the second schedule (a) of the deed of settlement, as the holder of one hundred shares; but he never executed the deed of

The defendant obtained an allotment of shares in a Joint-stock Company, completely registered under the 8 & 9 Vict. c. 110, the capital of which was to consist of 500,000*l.* in 50,000 shares. He paid the deposit, and his name was inserted in the register of shareholders, but he never executed the deed of settlement. The proposed amount of capital was never subscribed, but the Company commenced business with less; and having become embarrassed, an Act of Par-

liament (11 & 12 Vict. c. ciii.) passed for winding up the affairs of the Company. This Act, after reciting the deed of settlement, and that certain shares were unpaid, empowered the directors to sue for calls, and enacted that, in such actions, the register should be *primâ facie* evidence of the defendant being a shareholder, and of the number of his shares, provided that such calls should be made according to the provisions of the deed of settlement, and, as regarded the liability of shareholders, should be deemed to have been made under such provisions; and also provided that nothing in that Act contained, except as therein expressly enacted, should render liable to calls any shareholder or other person who would not have been liable thereto if that Act had not passed. The defendant having been sued for calls:—*Held*, first, that the private Act applied to *shareholders* only, and that the defendant was not liable as a shareholder, inasmuch as he had never executed the deed of settlement. Secondly, that even if the Act included *subscribers*, the defendant was not liable, for his contract was conditional upon the full amount of capital being raised, and that condition had not been performed or waived—*Martin*, B., dubitante.

(a) This schedule comprised a list of 20,407 shares, upon which the subscribers had not paid calls. See sect. 8, post, p. 19, note.

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settlement or any deed referring to it. In August, 1846, the Company was completely registered under the 8 & 9 Vict. c. 110. Several calls were made, and notice of them sent to the defendant; but he paid none of them, nor did he do any act with reference to the Company, except paying the above deposit. The whole amount of capital was never subscribed for, and 25,000 shares only were fully paid up. The directors nevertheless commenced business; and the Company having become embarrassed, on the 22nd of July, 1848, an Act of Parliament, 11 & 12 Vict. c. ciii. (a) was passed, for dissolving and facilitating

(a) The following are the material portions of the 11 & 12 Vict. c. ciii.:-

After reciting the deed of settlement of the 15th May, 1846, it proceeds: "And whereas, at the time of the date and execution of such deed of settlement, the number of the shares in the capital of the Company actually taken, holden, or at the disposal of the directors, was 45,407, whereof 25,000 shares were considered as fully paid up, and 20,407 shares were only in part paid up . . . And whereas there hath not been any other share in the capital of the Company taken since the time of the date and execution of such deed of settlement: And whereas, on the 14th day of August, 1846, the Company obtained the certificate of its complete registration, pursuant to the Act for the registration, incorporation, and regulation of Joint-stock Companies: And whereas the total amount remaining unpaid on such 20,407 shares is 51,652*l.* or thereabouts, whereof the sum of 600*l.*, or

thereabouts, due in respect of calls heretofore made, is secured by bills of exchange and promissory notes: And whereas it is apprehended that the Company could not safely rely on ultimately receiving the whole of such sum of 51,652*l.* for their purposes: And whereas it is apprehended that the proceedings of the Company and the directors have in some respects been illegal, irregular, or informal, and doubts are in consequence entertained as to the legal rights of some of their creditors to enforce their claims against the Company, and as to the power of the Company to enforce, without expensive litigation, the payment of the total amount remaining unpaid on such 20,407 shares; and it is also apprehended, that the difficulties occasioned by such doubts might lead to great litigation, and be ultimately productive of serious injury as well to some of such creditors as to the Company: And whereas the Company have for some time past been in a state of pecuniary

the winding-up of the affairs of the Company. Under the provisions of that Act, the calls in question were made.

embarrassment, and some of the shareholders thereof have been desirous of transferring their shares in the capital thereof, and have accordingly requested the directors to take such steps as, according to the terms of such deed of settlement, are necessary to give effect to such transfers: And whereas the directors, not having the means of ascertaining the solvency of the proposed transferees of such shares, and being apprehensive that the consequence of permitting such proposed transfers to be effected might be to add to the embarrassments of the Company, by rendering the ultimate recovery for the purposes of the Company of a further portion of such sum of 51,652*l.* improbable, and considering that in the present state of the affairs of the Company the liability of every shareholder thereof apparently exceeds the nominal value of his shares in the capital thereof, and that in such deed of settlement no provision was made for the existing condition of the Company, have refused to assist such shareholders in transferring such shares, and some of them have threatened legal proceedings against the directors to compel them to take the steps necessary for the effecting of such proposed transfer: And whereas, by reason of the pecuniary embarrassments of the Company, and of the present condition of the trade or

business in which they have been engaged, their affairs cannot any longer be carried on with advantage, and it hath become essential to wind up the affairs of the Company," &c.

Sect. 1 enacts, that, immediately after the passing of the Act, the Company shall be dissolved except for the purposes of that Act.

Sect. 8. "That, as and from the 15th day of May, 1846, the capital shall be deemed to have consisted of the sum of 454,070*l.* sterling money, divided into 45,407 shares of 10*l.* each, of which capital the sum of 250,000*l.* shall be deemed to have been on that day fully paid up and represented by the 25,000 shares which in the second schedule to such deed of settlement were distinguished as free or paid-up shares; and the sum of 204,070*l.* shall be deemed to have been on that day not fully paid up, and to have been represented by the 20,407 shares which in such second schedule were distinguished as shares remaining to be paid up on."

Sect. 29. "That the directors may, from time to time, when and as they shall think fit, call up and compel payment of such sums of money or instalments of capital, in respect of so many of such 25,000 shares and 20,407 shares respectively as for the time being shall exist, as they shall think necessary, and as

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It was submitted on behalf of the defendant, that he was not a shareholder liable for calls within the meaning

they shall from time to time appoint, yet so that they shall not make any one call exceeding 2*l*. a share, and that there be an interval of not less than two months between any two successive calls, and that every call be of the same amount in respect of every share, and so that any such call shall not be made for any other purpose than that of providing for the payment, satisfaction, or discharge of any of the debts, liabilities, or engagements of the Company now existing or duly incurred in carrying this Act into execution."

Sect. 30. "That, except as by this Act otherwise provided, every such call shall be made according to the provisions of the recited deed of settlement; and, as regards the liabilities of the shareholders, the forfeiture of shares, and otherwise, shall be deemed to have been made under such provisions."

Sect. 32. "That if at any time appointed by the directors for the payment of any such sum of money or instalment of capital, any shareholder fail to pay the same, the Company may sue such shareholder for the amount thereof unpaid in any Court of law or equity having competent jurisdiction, and recover the same, with lawful interest from the day on which the same was payable."

Sect. 33. "That in any action or suit by the Company against

any shareholder, to recover any money so unpaid, it shall not be necessary to set forth the special matter, but it shall be sufficient for the Company to declare that the defendant is the holder of one share or more in the Company (stating the number of shares), and is indebted to the Company in the sum of money so unpaid in respect of one call or more upon one share or more (stating the number and amount of each of such calls), whereby an action hath accrued to the Company by virtue of this Act."

Sect. 34. "That, on the trial or hearing of such action or suit, it shall be sufficient to prove that the defendant, at the time of making such call, was the holder of one share or more in the Company, and that such call was in fact made, and such notice thereof given, to the defendant as provided by this Act, and it shall not be necessary to prove the appointment of the directors who made such call or any other matter whatsoever; and thereupon the Company shall be entitled to recover what shall be due upon such call, with interest thereon, unless it shall appear either that any such call exceeds the amount prescribed by this Act, or that due notice, as prescribed by this Act, was not given, or that the interval prescribed by this Act between two successive calls had not elapsed, or that such call was made for

of that Act, inasmuch as he had never executed the deed of settlement. The learned Judge inclined to that opinion, but directed a verdict for the plaintiffs, reserving leave for the defendant to move to enter a nonsuit, if the Court should be of opinion that he was not liable.

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Crowder in last Hilary Term obtained a rule nisi accordingly; against which

Sir *F. Thegiger* and *Willes* shewed cause in Easter Term (April 29).—The 11 & 12 Vict. c. ciii. s. 35, renders the register of shareholders *prima facie* evidence of the defendant being a shareholder. It was, therefore, incumbent on him to establish that his signing the deed was a condition precedent to his liability to pay calls under the 29th section. For that purpose the interpretation clause (sect. 3) of the 7 & 8 Vict. c. 110, was relied on, which defines the word “shareholder” as a “person entitled to a share in a Company, and who has executed the deed of settlement, or a deed referring to it.” That a person, however, may be liable for calls before he has executed the deed of settlement, is apparent from the 26th section of that Act,

any other purpose than that of providing for the payment, satisfaction, or discharge of any of the debts, liabilities, or engagements of the Company now existing, or duly incurred in carrying this Act into execution.”

Sect. 35. “That the production of the register of shareholders of the said Company shall be *prima facie* evidence of such defendant being a shareholder, and of the number and amount of his shares.”

Sect. 54. “Provided always, and be it enacted, That this Act or anything therein contained shall not, except so far as is therein

expressly enacted, render liable to any creditor of the Company, or any person having or alleging any claim or demand against the Company, the Company or any shareholder or other person, if the Company or such shareholder or other person would not have been so liable if this Act had not been passed, or render liable to any call, contribution, debt, claim, or demand, the Company or any shareholder or other person, if the Company or such shareholder or other person would not have been liable thereto if this Act had not been passed.”

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which provides, "that no shareholder &c. shall be entitled to receive any dividends or profits, or be entitled to the remedies or powers hereby given to shareholders, until he shall have executed the deed of settlement, or a deed referring to it." That evidently contemplates two classes of shareholders, for it excludes those who have not executed the deed from all the advantages and privileges which those who have executed it are entitled to enjoy. There being no means of compelling a shareholder to execute the deed, the legislature, in order to give him a motive to do so, has placed him under this disability, that he is liable for calls, though he can exercise none of the rights of a shareholder. The interpretation clause (sect. 5) of the 11 & 12 Vict. c. ciii., is not at variance with this view: it enacts, that the word "'shareholders' shall mean the shareholders of the Company, and shall include former shareholders and the representatives of shareholders." *Hutton v. Thompson* (a) and *Norris v. Cooper* (b) are distinguishable; for the question in those cases was, whether the defendants were contributories within the meaning of the Winding-up Acts, 11 & 12 Vict. c. 45 and 12 & 13 Vict. c. 108.—[*Parke, B.*—The defendant's name should not have been placed on the register of shareholders, unless he had done some act to sanction the deviation from the original plan. It is well established, that if a person applies for shares in a projected Company, the capital of which is to consist of a definite number of shares, that is a condition precedent; and unless the entire amount of capital is subscribed for, the person so applying does not become a shareholder: *Fox v. Clifton* (c), *Dickinson v. Valpy* (d), *Pitchford v. Davis* (e). It is true, that he may waive the condition, or if he signs the deed, he is bound by its terms.] The deed of settlement was in accordance with the provisions

(a) 3 H. L. Cas. 161.

(b) Ibid.

(c) 4 M. & P. 676.

(d) 10 B. & C. 128.

(e) 5 M. & W. 2.

of the 7th section of the 7 & 8 Vict. c. 110, which does not require that all the subscribers should sign it. In that section the word "shareholder" is used as synonymous with "subscriber," and it has the same meaning in the former part of the 26th section. [*Parke, B.*—The word "instalment" in that section must mean an unpaid portion of the sum agreed to be subscribed. Then the question is, whether the same construction is to be put upon the private Act, which enables the directors to enforce contribution for loss.] The 11 & 12 Vict. c. ciii. includes all persons who, as shareholders, would be liable for calls under the 7 & 8 Vict. c. 110.—They then referred to the 25th, 27th, and 55th sections of the 7 & 8 Vict. c. 110.

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Crowder and *Milward* in support of the rule.—The defendant only contracted to become a shareholder in the Company provided the proposed amount of capital was paid up, and he never sanctioned the act of the directors in commencing business with less. The 11 & 12 Vict. c. ciii. incorporates the deed of settlement, and refers to the liability of the shareholders under the deed, which was limited to the amount of their shares; it then enables the directors to make further calls for the purpose of satisfying the claims on the Company. The defendant was not a *shareholder* within the meaning of the 7 & 8 Vict. c. 110, and therefore is not liable to contribute as a shareholder under the 11 & 12 Vict. c. ciii. The contract of the subscribers to become partners depends solely upon the execution of the deed of settlement. The interpretation clause (sect. 3) of the 7 & 8 Vict. c. 110, shews that no person can be a shareholder within the meaning of that statute, unless he has executed the deed of settlement. In the 4th section, relating to provisional registration, which may take place before a deed of settlement is drawn up, the word "subscribers" is used; but the 7th section, which provides for complete registration, requires

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that there shall be "a deed under the hands and seals of the shareholders, and that such deed shall contain a covenant on the part of every shareholder to pay instalments on shares," thus making a marked distinction between mere subscribers and shareholders. In the 11th section, which requires a half-yearly return of the transfer of shares, the word "shareholder" clearly means a person who has executed the deed; for, according to the form of transfer in schedule (K.), the transferee agrees to take the shares "subject to the same conditions and to the provisions of the deed or deeds of settlement;" so that, upon executing the transfer, which refers to the deed of settlement, the transferee comes within the definition of a shareholder in the interpretation clause (sect. 3), and is in the same position as if he had executed the deed itself. By the 25th section, on complete registration, the "shareholders and all succeeding shareholders" become incorporated for certain purposes, but only with reference to the deed of settlement; and the legislature, in enumerating what the Company are then empowered to do, mentions "subscribers" as distinguished from "shareholders," the latter only being authorised to take part in making by-laws. In the same manner, the 37th section enables shareholders, not subscribers, to inspect the accounts. The 49th section, which requires a register, and the 55th, which relates to the recovery of instalments, evidently apply only to shareholders as defined by the 3rd section. The 26th section alone affords any ground for argument that the word "shareholder" includes a subscriber; but the true meaning of that section is, that, although a shareholder has executed the deed of settlement, he shall not enjoy the rights of a shareholder, unless he has also paid all calls. The 11 & 12 Vict. c. ciii. has not imposed any liability on a new class of persons. It has for its basis the deed of settlement; and the meaning of the 35th section is, that the register shall be *prima facie* evidence against such persons

as are shareholders within the meaning of the 7 & 8 Vict. c. 110.—They referred to *Wilson v. The Birkenhead, Lancashire, and Cheshire Junction Railway Company (a)*.

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Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—In this case the point reserved on the trial before my Lord Chief Baron was, whether the defendant was a *shareholder*, and liable to contribute to the debts of the Company, under the Act 11 & 12 Vict. c. ciii. (local and personal), passed for the purpose of winding up the affairs of the Company. He had applied for and obtained an allotment of shares; he had paid the deposit upon them, but he had not executed the deed of settlement of the Company, or any deed referring to it. The capital of the Company was to consist of 500,000*l.*, in 50,000 shares, when the defendant applied for and obtained shares. That amount never was subscribed; but the Company began business with less, and, not succeeding, the Act of Parliament, 11 & 12 Vict. c. ciii., was passed, for the purpose of winding up the concern.

That Act recites the deed of settlement, and that, at the time of its execution, the number of shares actually taken, holden, or at the disposal of the directors, was not 50,000, but 45,407 only, of which 25,000 were considered as fully paid up, and the rest in part only; that the Company was completely registered; that 51,652*l.* remained unpaid on the 20,407 shares; that, in consequence of irregularity in the proceedings of the Company and directors, doubts were entertained as to the power of the Company to enforce, without expensive litigation, the payment of the total amount remaining unpaid; that the Company was in pecuniary embarrassments; that, in the then present state of

(a) 6 Exch. 626.

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the affairs of the Company, the liability of each shareholder apparently exceeded the nominal value of his shares; that, in the deed of settlement, no provision was made for the existing condition of the Company; and that it was necessary to wind up their affairs. It then proceeds to enact, by sect. 1, that the Company shall be dissolved; by sect. 8, that the 20,407 shares, mentioned in the second schedule to the deed of settlement, shall be deemed remaining to be paid up on; and provides, by sect. 29, that the directors may, when they shall think fit, call up and compel payment of such sums of money or instalments of capital in respect of 25,000 and 20,407 shares as they shall think necessary, at certain intervals. Then follows a clause enacting, that, except as by that Act otherwise provided, every such call shall be made according to the provisions of the deed of settlement; and as regards the *liability of the shareholders*, the forfeiture of shares and otherwise shall be deemed to have been made *under such provisions*. Another clause, the 32nd, provides that if, at the time appointed, any *shareholder* shall fail to pay the calls, the Company may sue such shareholder. The form of the declaration is then given; and, by sect. 34, it is enacted to be sufficient to prove at the trial, that the defendant was a holder of shares at the time of the call; and by sect. 35, the production of the register of shareholders of the Company shall be *primâ facie* evidence of such defendant being a shareholder, and of the number of his shares; and at the end of the Act, (sect. 54), there is this proviso: "Provided always, and be it enacted, that this Act, or anything therein contained, shall not, *except so far as is therein expressly enacted*, render liable to any creditor of the Company, or any person having or alleging any claim or demand against the Company, the Company or any shareholder or other person, if the Company or such shareholder or other person would not have been so liable if this Act had not been passed, *or render liable to any call*, contribution, debt,

claim, or demand, the Company or any *shareholder* or other person, if the Company or such shareholder or other person would not have been liable thereto if this Act had not been passed."

It appears from the deed itself, that, amongst the subscribers holding shares parcel of the 20,407 in the second schedule mentioned, is the defendant's name: and if the statute had enacted that those who are *named as shareholders* in the second schedule should be compelled to pay, this express enactment, however unjust, would have rendered the defendant liable, and he would not have been exempted though otherwise not liable, under this clause. But there is no such *express* enactment; and it certainly would be most unjust if there had been. Nor is it *implied* that those named in the deed as shareholders, who *did not execute it*, should be obliged to pay. The statute enacts, sect. 29, that the directors shall call for money or instalments on so many, both of the 25,000 and 20,407 shares, as shall exist, and makes the *shareholder* (that is, the real shareholder), who fails to pay such calls, liable to an action, but it leaves the question open, *who is a shareholder*.

Who then is such a shareholder? In the interpretation clause (sect. 5) the word "shareholders" is declared to mean the shareholders of the Company, and to include former shareholders and their representatives. By the Act 7 & 8 Vict. c. 110, under which this Company was completely registered, the word "shareholder" is by the interpretation clause (sect. 3) declared to mean, "any person entitled to a share in a Company, and *who has executed the deed of settlement*, or a deed referring to it;" and this meaning it is to bear, so far as it is not excluded by the context, or by the nature of the subject-matter. By sect. 25, the *shareholders* are incorporated; and sect. 55 gives a remedy to recover calls against the *shareholders*. Under *this* Act of Parliament, a shareholder, therefore, must be one who has subscribed the deed of settlement, or a deed refer-

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ring to it, unless there is something in the context to give it a different meaning, and certainly there is nothing in that clause to give it a different meaning. But in the 26th there is a provision, that "no shareholder of any joint-stock Company completely registered under this Act shall be entitled to receive *any dividends or profits*, or be entitled to the remedies or powers hereby given to shareholders, until he shall *have executed* the deed of settlement of the Company, or some deed referring thereto, and also have paid up *all instalments or calls due from him*, and shall have been registered in the Registry Office aforesaid." In this last section, the word "shareholder," by reason of the context, may have a different interpretation, but not in the other part relating to the enforcement of calls. The argument used by the plaintiffs' counsel, that this clause shews that "*a shareholder*" may be liable to calls before he has executed the deed, does not appear to us to be of any weight. The meaning is, that a shareholder *who has executed* must nevertheless pay calls before he is entitled to share profits.

From these references to the Acts of Parliament, it is no doubt clear that there was a *primâ facie* case against the defendant, of his being a *shareholder* within the meaning of the latter Act, as his name was on the register, which is made *primâ facie* evidence. But we think that on the facts in proof in this case, that *primâ facie* case was rebutted, and the defendant was not a *shareholder* liable to calls under the private Act.

First, because that Act applies to *shareholders* only, and shareholders are by the general Act, 7 & 8 Vict. c. 110, those who have executed the deed; and by sect. 30 of the private Act, the liability of shareholders to calls is to be according to the *deed of settlement*, which could attach on those only who signed it. Again, the private Act expressly provides, that no one shall be made liable by it who would not have been liable if the Act had not passed. By the

general Act, shareholders only, that is, those who executed the deed, were liable. The object of the private Act appears to us merely to give greater effect to the provisions of the deed, and extend its operation against the parties to it only. As it appears in evidence in this case, that the defendant never did execute the deed, and therefore was not a *shareholder* in the proper sense, the *prima facie* evidence of the register is rebutted.

But secondly, if this view of the construction of the private Act be wrong, and it extends to shareholders, that is, *subscribers*, or persons who have taken shares, and who have not executed the deed, we still are of opinion that the defendant is not liable. His agreement to take shares in a concern which was to have a capital of 500,000*l.* is, upon the authority of many cases, (*Pitchford v. Davis* (a) and others), a conditional contract, i. e. provided *that* capital is subscribed for; and unless that condition is performed or waived, the defendant is not a "shareholder," in the sense of a person having agreed to take shares. Then, although the register is *prima facie* evidence that the defendant was a shareholder, the fact of the agreement to take shares having been conditional is proved in the case, and also the non-compliance with that condition, for the private Act shews that less than 50,000 shares were taken. This, we think, proves that he was not bound to take the shares, unless the plaintiffs proved affirmatively that the defendant waived the condition, and agreed to take shares in a concern with less capital than 500,000*l.*, which was certainly not done.

We think, therefore, that the rule should be absolute to enter a nonsuit. This is the judgment of my Lord Chief Baron, my Brother *Alderson*, and myself; my Brother *Martin* however entertains some doubt on the second point.

Rule absolute.

(a) 5 M. & W. 2.

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(BEFORE PARKE, B., AND PLATT, B.)

Feb. 21.
June 19.

THE GREAT NORTHERN RAILWAY COMPANY, Appellants, v.
SHEPHERD, Respondent.

A carrier of passengers for hire is, at common law, only bound to carry their *personal* luggage; therefore, if a passenger has merchandise among his personal luggage, or so packed that the carrier has no notice that it is merchandise, he is not responsible for its loss. But if the merchandise is carried openly, or so packed that its nature is obvious, and the carrier does not object to it, he will be liable.

Under the 6th section of the 7 & 8 Vict. c. 85, which allows each passenger by a Parliamentary train to carry half a hundred weight of luggage, a husband and wife travelling together are entitled to carry one hundred weight.

The luggage of a passenger by railway, though never delivered to any servant of the Company, but kept by the passenger during the journey, is, nevertheless, in point of law, in the custody of the Company, so as to render them responsible for its loss.

THE following case was stated for the opinion of this Court by the judge of the County Court of Yorkshire holden at Sheffield:—

This action was brought to recover damages amounting to 40*l.* 3*s.* 2*d.*, comprising the following items:

| | £ | s. | d. |
|--|------------|----------|----------|
| 124 dozen of ivory handles, cost price | 33 | 19 | 8 |
| Carpet bag | 0 | 7 | 0 |
| Books | 0 | 15 | 0 |
| Two handkerchiefs | 0 | 1 | 6 |
| Loss of sale of ivory handles and expenses | 5 | 0 | 0 |
| | <u>£40</u> | <u>3</u> | <u>2</u> |

The cause was tried on the 5th of November, 1851, when the following facts were proved or admitted:—On the 2nd of August last, the plaintiff, who is a cutler at Sheffield, took a third class ticket of the defendants at the Great Northern Railway station at Sheffield, to go (by one of their excursion trains which left Sheffield on that day) to London and to return to Sheffield, and for which he paid the sum of 5*s.* During the plaintiff's stay in London, he purchased a quantity of ivory handles for table knives. On the 6th of August, the plaintiff left London by the return excursion train of the defendants, accompanied by his wife and two other persons. The luggage of the plaintiff consisted of a carpet bag, a deal box about

two feet long, and two brown paper parcels, wrapped in blue checked handkerchiefs. The carpet bag, besides some books and other trifling articles, of the value of 1*l.* 3*s.* 6*d.*, contained ivory handles, as did also the box and parcels, and the total quantity of ivory handles was 283 dozen. Each packet had upon it the plaintiff's name and address, both at Sheffield and in London. The luggage allowed to a third class passenger by the 7 & 8 Vict. c. 85, s. 6, is 56*lbs.*, and the same weight was also allowed to third class passengers by the defendants' excursion train.

The plaintiff admitted that he took no other luggage with him from Sheffield, and that the ivory handles were articles bought by him to use in his business. The plaintiff and his wife placed the bag and parcels in the carriage in which they rode under the seats, and the porters of the Company did not interfere in any way, and the box was placed in the luggage van by the plaintiff. The plaintiff, on arrival at Retford, where the line of railway divides and passengers from Sheffield are obliged to change carriages, took the parcels out of the carriage and placed them with the box on the platform, where they remained for nearly an hour, until the fresh carriage was ready to proceed to Sheffield. The plaintiff then put the box in the luggage van, and he placed the other parcels in the carriage where he and his wife took their seats to continue their journey to Sheffield, and did not call the porter to assist him.

Subsequently to their departure in the train from Retford, and previously to their arrival at Sheffield, a collision took place. The train was obliged to stop on account of some obstruction. There was no guard in attendance upon it to warn any coming train, and the next train run into the train in which the plaintiff and his wife were. They were both much hurt, and upon being assisted into another train, which was then provided for them to be forwarded to Sheffield, the plaintiff, as he was getting into

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the train, spoke to one of the railway porters about the luggage, who told him not to make himself uneasy, it would be all right. A messenger, sent by the plaintiff to the defendants' station to inquire for the luggage on the following day, was told that the defendants would inquire about it. The box was afterwards forwarded to the plaintiff by the defendants, but the other articles were never restored to him.

The first point raised on the part of the defendants was, that the goods lost were not luggage, but merchandise, and being also above the weight allowed to third-class passengers, even if luggage, the plaintiff was not entitled to recover. The judge decided against that objection, on the following grounds: namely, that as the plaintiff and his wife were travelling together, they would be entitled to carry half a hundred weight each, and therefore the two would be entitled to carry one hundred weight between them, which was more than the whole of the parcels weighed; but that, even assuming that the Company were not bound to carry the goods in question without extra charge, and that they might have refused to do so, either on the ground of their being merchandise and not articles of personal luggage, yet, as they had not refused, he held they were just as much subject to the ordinary liabilities of carriers as if the goods had been under the allowed weight, and had been personal luggage of the passenger; the object of the clause in the Act of Parliament, in his opinion, being merely to compel Railway Companies to carry a certain quantity of luggage for each passenger without extra charge, and not to affect their liabilities for loss of such goods as they do consent to carry. The second point raised by the defendants was, that the goods were never in the custody of the defendants; but the judge found that the goods were in the custody of the defendants, and gave a judgment for the plaintiff for 35*l.* 3*s.* 2*d.*

The questions for the opinion of the Court are:—

First, whether, under the circumstances proved at the trial, the Company are liable for the loss of the above articles of merchandise.

Secondly, whether, under the circumstances proved at the trial, the plaintiff and his wife were jointly entitled to carry between them 112 lbs of luggage.

Thirdly, whether the Company had accepted the custody of the goods under the circumstances proved at the trial, so as to render them liable to the plaintiff, or whether the goods were in the sole personal custody of the plaintiff.

Phipson (*Wordsworth* with him) argued for the appellants in last Hilary Vacation (February 22nd).—It is conceded on the part of the defendants below, that the lost articles were not in the sole custody of the plaintiff, and that the defendants are responsible for the loss of such as are strictly *personal luggage*; but it is submitted, that the ivory handles are merchandise, not luggage; also that, if they are luggage, there was an excess of weight beyond that allowed to third class passengers by the 7 & 8 Vict. c. 85, s. 6.—The Court then called on

Mellor for the respondents.—The restrictions imposed by that statute are for the benefit of Railway Companies, and they may waive them. [*Parke*, B.—It does not appear that the Company knew that this luggage was merchandise.] This was not an ordinary third class train, but an excursion train, to which the provisions of the 7 & 8 Vict. c. 85, s. 6, do not apply. The Company were not limited to the rate of charge prescribed by that Act for third class passengers, nor were they bound to stop the train at every station, as in the case of third class trains. It was optional with them to carry merchandise; and as no objection was made to this luggage, it must be assumed that part of the fare was paid as the consideration for carrying it. The

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Company are liable as common carriers, unless they limit their responsibility by special contract; and if they intended that the conditions attached to third class trains should apply to this train, they ought to have given notice to that effect. Besides, there is evidence of gross negligence on the part of the Company. [Parke, B.—That is not found as a fact, and the 13 & 14 Vict. c. 61, s. 14, only gives an appeal when either party is dissatisfied with the determination or direction of the County Court “in point of law, or upon the admission or rejection of any evidence.” The simple point is, whether, if merchandise be taken as part of the personal luggage of a third class passenger, the Company are responsible. If the articles had been carried openly, so that it might have appeared that they were merchandise, the Company, if they undertook to carry them, would be liable for their loss; but why should they be so, when they did not know what the parcels contained, and therefore had no opportunity of bargaining for any extra charge?] It was their duty to have made all necessary inquiries. The correct rule on that subject is stated by Parke, B., in his judgment in *Walker v. Jackson* (a).

PARKE, B.—The provision in the Act of Parliament is equivalent to notice that the Company will carry with each passenger fifty-six pounds of luggage, but *not merchandise*. It is necessary to ascertain whether or no the Company were, with respect to persons travelling by the excursion train, entirely released from the conditions imposed by the statute upon third class trains. If they were, they might nevertheless contract to carry under the obligations relating to parliamentary trains, in which case it is clear the plaintiff could not recover. But if the matter was left at large, the defendants were under the ordinary obligations of car-

riers at common law. The case must be remitted to the judge of the County Court, to state whether the defendants carried passengers by the excursion train upon the terms contained in the 6th section of the 7 & 8 Vict. c. 85, or whether there was a distinct contract in respect of the excursion train.

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The case having been accordingly referred back to the judge, it was amended as follows:—

“The Court of Exchequer having, on the hearing of this appeal, ordered that the special case be referred back to the judge of the County Court, to state the terms upon which the defendants carried passengers by the excursion train in question, and whether they carried them upon the terms contained in the 6th section of the 7 & 8 Vict. c. 85, I have to state that no evidence was given or tendered as to the terms upon which the defendants carried passengers by the excursion train, unless the admitted fact that the charge for each third class passenger by the said train was much less than one penny for each mile travelled, be of itself, in the opinion of the Court of Appeal, sufficient proof in point of law that they carried them upon the terms contained in the said 6th section; and (subject to such opinion of the said Court) I find that the defendants did not carry passengers by the said excursion train upon the terms contained in the 6th section of the 7 & 8 Vict. c. 85; and that there was no special contract as to the terms between the plaintiff and the defendants, but that they carried him and other passengers and their luggage by the said train upon the same terms as those upon which the defendants and other Railway Companies carry passengers, whether of the first, second, or third class, and their luggage, by their ordinary passenger trains; and which terms (as I conceive) are the same as those on which stage-coach proprietors, and other

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common carriers of passengers for hire do, by the laws of England, carry passengers and their luggage."

(Signed) "W. WALKER."

Phipson (*Wordsworth* with him) now argued for the appellants.—There being no evidence of the terms upon which the defendants undertook to carry the luggage of passengers by this excursion train, the question must be decided according to their common-law liability as carriers. Now, conceding that they are responsible for what is, strictly speaking, personal luggage, it is submitted that at common law a carrier would not be liable for other luggage delivered to him under circumstances like these. The principal articles were merchandise, purchased for the purpose of being wrought up and sold again. The plaintiff concealed from the defendants what he was carrying; and although no fraud might be intended, his conduct amounted to fraud in law, so as to exempt the defendants from liability for the loss. The principle is so stated by Lord *Mansfield*, in the case of *Gibbon v. Paynton* (a). There, 100*l.* was sent by coach from Birmingham to London, hid in hay in an old nail bag; the bag and hay arrived safe, but the money was gone. Lord *Mansfield* said "His (the carrier's) warranty and insurance is in respect of the *reward* he is to receive, and the reward ought to be proportionable to the risk. If he makes a greater warranty and insurance he will take greater care, use more caution, and be at the expense of more guards or other methods of security; and therefore he ought, in reason and justice, to have a greater reward. Consequently, if the owner of goods has been guilty of a fraud upon the carrier, such fraud ought to excuse the carrier."—The Court then called on

Field for the respondent.—The Company are responsible. It is expressly found that there was no special con-

(a) 4 Burr. 2299.

tract or notice by the Company limiting their liability as common carriers. The case is, therefore, distinguishable from *Batson v. Donovan* (a), for there the carrier gave notice that he would not be answerable for parcels of value unless entered and paid for as such; and the jury found that the owner had been guilty of an unfair concealment of the nature and value of the parcel. [Parke, B.—Had the Company known that the articles were merchandise, they would probably have charged for them.] If they wished to protect themselves against the particular risk, it was their duty to have made inquiry as to the quality and value of the goods. In *Riley v. Horne* (b), *Best*, C. J., in delivering the judgment of the Court says—“A carrier has a right to know the value and quality of what he is required to carry. If the owner of the goods will not tell him what his goods are, and what they are worth, the carrier may refuse to take charge of them; but if he does take charge of them, he waives his right to know their contents and value.” Then, after reviewing the cases on the subject, *Best*, C. J., goes on to say (c)—“It may be collected from these authorities, that it is the duty of the carrier to inquire of the owner as to the value of the goods; and if he neglects to make such inquiry, or to make a special acceptance, and cannot prove knowledge of a notice limiting his responsibility, he is responsible for the full value of the goods, however great it may be.” [Parke, B.—No doubt it is the duty of the carrier, on receiving the parcel, to ask such questions as may be necessary; and if he ask no questions, and there be no fraud, he is liable for its loss. It was so laid down in *Walker v. Jackson* (d). But in this case the contract was to carry passengers and their luggage. Then, if the Com-

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(a) 4 B. & Ald. 21.

(b) 5 Bing. 222.

(c) Page 223.

(d) 10 M. & W. 161.

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pany had notice that a passenger brought with him goods which were not luggage, and they chose to carry them, they would be responsible; but if no notice is given, there is an unfair concealment, which prevents them from making a charge as for merchandise.] Some light may be thrown on this point by considering the question of quantity. If a passenger, entitled to carry 112lbs. weight of luggage, were to bring 113lbs., would that relieve the Company from responsibility for loss? [*Parke, B.*—No, it is their duty to weigh it.] In like manner, they should have inquired as to the contents of the bag. Besides, there was a new contract between the parties after the collision. The plaintiff was disabled, and the Company undertook to take care of his luggage and forward it to the place of destination. According to the principle laid down in *Coggs v. Bernard* (a), they are responsible, although this agreement was without reward.

PARKE, B.—In this case, there being no special contract, the defendants were bound to carry the plaintiff and his *luggage*, which term, according to the true modern doctrine on the subject, comprises clothing and such articles as a traveller usually carries with him for his personal convenience; perhaps even a small present, or a book for the journey, might be included in the term; but certainly not merchandise or materials bought for the purpose of being manufactured and sold at a profit: *Angell on Carriers*, s. 115; *Story on Bailments*, 526, 5th ed. note. In this case, nine-tenths of the articles were of the latter description. Now, if the plaintiff had carried these articles exposed, or had packed them in the shape of merchandise, so that the Company might have known what they were, and they had chosen to treat them as personal luggage,

(a) 2 Ld. Raym. 909.

and carry them without demanding any extra remuneration, they would have been responsible for the loss. So also upon any limit in point of weight, if the Company chose to allow a passenger to carry more, they would be liable. The judge states, that there was no evidence as to whether the defendants carried passengers by this excursion train upon the terms contained in the 6th section of the 7 & 8 Vict. c. 85, unless the Court shall be of opinion that the fact, that the charge for each passenger was less than a penny a mile, was of itself sufficient proof that they carried upon those terms. That, however, it is not necessary to decide; because, assuming that they did not carry on those terms, the defendants only agreed for the stipulated fare to carry passengers and every thing which constituted personal luggage, and were not bound to carry merchandise, or articles wholly unconnected with luggage. If, indeed, they had notice, or might have suspected from the mode in which the parcels were packed, that they did not contain personal luggage, then they ought to have objected to carry them; but the case finds that they had no notice of what the packages contained. Whether this was done for any fraudulent purpose, it is not necessary to inquire; because, even if there was no fraudulent intent, the plaintiff has so conducted himself that the Company were not aware that he was not carrying luggage, and therefore the loss must be borne by him. It was contended that, after the accident happened, a new special contract was entered into, by which the Company undertook to take care of the plaintiff's luggage. But that argument fails. If, indeed, an accident had happened to a perfect stranger, and the Company had agreed without compensation to forward his luggage, they would, according to *Coggs v. Bernard*, be responsible for its loss. But in this case the plaintiff was a passenger, and the intention of the Company was only to carry into effect the original contract; and from that alone their obligation arises. I am there-

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fore of opinion, that the Company are not liable; and the judgment of the Court below must be reversed.

PLATT, B., concurred.

Judgment reversed without costs, the defendants undertaking to pay *l. 3s. 6d.*, the value of the plaintiff's personal luggage.

June 26.

COUTURIER and Others v. HASTIE and Others.

The plaintiffs, merchants at Smyrna, chartered a vessel to proceed to Salonica, and there having loaded a cargo

of Indian corn, to proceed to a safe port in the United Kingdom. The plaintiffs accordingly shipped, at Salonica, 1180 quarters of Indian corn; and on the 22nd of February, 1848, the master signed a bill of lading, making the corn deliverable "to order of the plaintiffs or to their assigns, he or they paying freight as per charter-party." The plaintiffs indorsed the bill of lading, and sent it together with the charter-party to B., their London agent, with orders to sell the cargo on their account; and they also, through B., insured the cargo "at and from Salonica to the port of discharge in the United Kingdom," &c., "corn warranted free from average unless general, or the ship be stranded." On the 1st of May, 1848, B. employed the defendants, corn-factors in London, to sell the cargo, and sent them the bill of lading indorsed, the charter-party, and policy of insurance; and they advanced 600*l.* on the cargo. The custom of corn-factors is to sell under a *del credere* commission, and when so selling not to mention the purchaser. On the 15th of May, 1848, the defendants sold the cargo to C., and sent him a bought note, which stated, that he had bought of them "1180 quarters of Salonica Indian corn of fair average quality when shipped, at 27*s.* per quarter, free on board, and including freight and insurance, to a safe port in the United Kingdom, payment at two months from this date, upon handing over shipping documents." On the same day the defendants wrote to B., advising him of the sale, but without making any mention of the purchaser or of commission. The vessel sailed from Salonica on the 23rd of February; and having met with tempestuous weather, the cargo became so heated and fermented that the vessel was obliged to put into Tunis Bay, where the cargo, having been surveyed, was found to be unfit to be carried further, and, on the 24th April, it was sold. On the 23rd May, C. gave the defendants notice that he repudiated the contract, on the ground that the cargo did not exist at the time of the sale to him. In March, 1849, C. became bankrupt. The plaintiffs brought the present action against the defendants to recover the price of the cargo, and declared specially on a *del credere* guarantee:—*Held*, first, that the true meaning of the contract (which could not be explained by evidence of mercantile usage) was, that the purchaser bought the cargo, if it existed at the date of the contract; but that, if it had been damaged or lost, he bought the benefit of the insurance; and therefore he was bound to pay the stipulated price in a reasonable time after the bill of lading and other shipping documents were handed over to him—*Pollock*, C. B., dissented.

Secondly, that the defendants were responsible by reason of their *del credere* commission, although there was no guarantee in writing signed by them, since this was not an undertaking to pay the debt of another within the 4th section of the Statute of Frauds.

Thirdly, that the plaintiffs were entitled to judgment non obstante veredicto on a plea which stated, that, at the time the defendants were employed to sell the corn, it was heated and fermented, and had been unloaded and sold; that the defendants and C. were ignorant of the premises; and that C., in a reasonable time after the sale, and before the time of payment, repudiated the contract.

sel from Salonica, for and on account of the plaintiffs, under a bill of lading, by which the Indian corn was deliverable to the plaintiffs or their assigns, paying freight for the carriage as provided for by a charter-party theretofore in that behalf made, with primage and average accustomed; and the vessel to proceed from Salonica for any safe port in the United Kingdom, calling at Cork or Falmouth for orders. That the plaintiffs had caused to be effected a policy of insurance upon the Indian corn, whereby the plaintiffs were insured, lost or not lost, at and from Salonica, on the said voyage, from the time of the loading the corn on board. That before the making of the promise, &c., the vessel had sailed on her voyage from Salonica with the Indian corn on board, and had not at the time of making the promise called at Cork or Falmouth, or arrived at any port of the United Kingdom; of which the defendants had notice. And thereupon, in consideration that the plaintiffs, at the request of the defendants, had retained and employed the defendants, for commission and reward, to endeavour to sell and dispose of the corn on the terms, amongst other things, of the corn having been shipped free on board, and of having been at the risk of the purchaser from such loading thereof on board the same vessel, the defendants to give notice to the plaintiffs of the terms and conditions of the sale thereof within a reasonable time after making such sale; the defendants promised the plaintiffs to endeavour to sell and dispose of the corn for the plaintiffs, on the terms, amongst other things, of the corn having been shipped free on board, and of having been at the risk of the purchaser from such loading thereof on board the same vessel, and to give notice to the plaintiffs of the terms and conditions of the sale thereof within a reasonable time after making such sale, and to be responsible to the plaintiffs for the price of the corn, according to the terms and conditions of such sale specified in such notice so to be given.—Averments,

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that the defendants, on the 15th of May, 1848, sold the corn to one A. Callender, on the terms, amongst other things, of the corn having been shipped free on board, and of having been at the risk of the purchaser from such loading thereof on board the same vessel, at and for the price of 27*s.* by the quarter, free on board, and including freight and insurance; the measure of the corn to be calculated as customary; payment of the price to be made at two calendar months from the day and year last aforesaid: that the defendants afterwards gave notice to the plaintiffs of the terms and conditions of the sale.—Breach, that although the price of the corn amounted to 2000*l.*, and the time of payment had elapsed before the commencement of the suit, yet the defendants would not pay the plaintiffs, nor be responsible to them for the price of the corn; and the same is unpaid by A. Callender or the defendants, &c.

Pleas:—First, non assumpsit.

Secondly, that the plaintiffs had not retained or employed the defendants to endeavour to sell or dispose of the corn on the terms in the declaration alleged, *modo et formâ*.

Thirdly, that the defendants did not sell or dispose of the corn on the terms in the declaration mentioned, *modo et formâ*.

Fourthly, that the defendants did not give notice to the plaintiffs of the terms and conditions of the sale, *modo et formâ*.

Fifthly, that, after the sailing of the vessel so laden with the corn, and before the sale and disposal of the corn, and before the arrival of the vessel at any port of the United Kingdom, and before the vessel had called at Cork or Falmouth for orders, and whilst the vessel was on her voyage from Salonica with the corn so on board thereof, the plaintiffs sold and delivered the corn to certain persons other than the defendants, and other than A. Callender, whose names are to the defendants unknown; since which sale

the plaintiffs have never had any property in the corn, or any right to sell or dispose thereof or of any part thereof; of which sale and delivery by the plaintiffs the defendants and A. Callender, at the time of the sale and disposal by the defendants, were, and each of them was, wholly ignorant: whereupon, and for the cause aforesaid, A. Callender, within a reasonable time after the said sale and disposal, and before the time for payment of the price, repudiated the said sale, and refused to perform his contract for the same or pay the price.—Verification.

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Sixthly, that, before and at the time of the said retainer and employment, the corn had become and was heated and fermented, and greatly damaged and injured, in the said vessel, and had been and was discharged and unloaded from the same by reason thereof, and sold and disposed of by the captain of the vessel for and on account of the plaintiffs. That the defendants, at the time of the said retainer and employment, and also at the time of the said sale and disposal, were ignorant of the premises. That A. Callender was also ignorant thereof; and for the cause aforesaid, within a reasonable time after the sale and disposal in the declaration mentioned, and before the time had arrived for the payment by him of the price of the corn, to wit, on &c., for the cause aforesaid, repudiated the said sale, and refused to complete the same or his said contract, and refused to pay the price of the corn, or any part thereof.—Verification.

Seventhly, that the plaintiffs retained and employed the defendants by and through one E. Bernoulli, their agent in that behalf; and that E. Bernoulli, as such agent, did procure the defendants to make their said promise, which promise was made by them to the plaintiffs through E. Bernoulli, as such agent, and not otherwise. That before the retainer and employment of the defendants, and before the sale and disposal of the corn, and after the loading thereof on board the said vessel, and before the vessel

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with the corn on board had called at Cork or Falmouth, or arrived at any port or ports of the United Kingdom, the corn had become and was, in the course of the voyage, to wit, at Tunis, in Africa, unloaded and discharged from the said vessel, and condemned, and sold to other persons than the defendants or A. Callender, whose names are to the defendants unknown; and the plaintiffs had become and were, by reason of the premises, wholly unable to deliver or obtain the delivery of the corn, or any part thereof, at any port of the United Kingdom: all of which premises E. Bernoulli, at the time of the said retainer and employment by him of the defendants, well knew, and of all which the defendants were ignorant; and the vessel afterwards arrived in England without the corn or any part thereof on board. That E. Bernoulli, before and at the time of the sale and disposal, and of the retainer and employment as aforesaid, withheld and concealed from the defendants and A. Callender all knowledge and notice of the premises; and neither the defendants nor A. Callender, at the time of the sale and disposal of the corn, knew or had notice of the premises; and that A. Callender, within a reasonable time of the said sale and disposal of the corn, and before the time had arrived for the payment of the price thereof, for the cause aforesaid, repudiated the contract of sale, and refused to perform the same or to pay the said price.—Verification.

The plaintiffs joined issue on the four first pleas; and to the fifth, sixth, and seventh replied *de injuriâ*.

At the trial, before *Martin, B.*, at the London Sittings after last Michaelmas Term, it appeared that the action was brought to recover the price of a cargo of Indian corn, sold under the following circumstances:—The plaintiffs were merchants at Smyrna, and the defendants corn-factors in London. In January, 1848, the plaintiffs chartered a vessel, called the "*Kezia Page*," to proceed to Salonica, and there load a cargo of Indian corn, and being so loaded

to proceed to a safe port in the United Kingdom, calling at Cork or Falmouth. The plaintiffs accordingly shipped on board the vessel, at Salonica, 1180 quarters of Indian corn; and on the 22nd of February, 1848, the master signed a bill of lading, making the corn deliverable "unto order of the plaintiffs or to their assigns, he or they paying freight for the said goods as per charter-party, with primage and average accustomed." The plaintiffs indorsed the bill of lading, and sent it, together with the charter-party, to Messrs. Bernoulli, their London agents, with orders to sell the cargo on the plaintiffs' account, and they also, through Messrs. Bernoulli, caused an insurance to be effected, on the 8th of February, 1848, upon the cargo "at and from Salonica to the port of discharge in the United Kingdom, with leave to call for orders; corn, &c., warranted free from average unless general, or the ship be stranded." On the 1st of May, 1848, Messrs. Bernoulli arranged with the defendants for the sale of the cargo, and they agreed to advance upon it 600%. Evidence was given that the custom of corn-factors is to sell under a del credere commission of 9*d* a quarter, being about three and a half per cent. on the price inserted in the bought note; and when selling under such commission, they are not in the habit of stating to whom they sell. On the above-mentioned day, Messrs. Bernoulli sent to the defendants the bill of lading indorsed by them, and the charter-party, in a letter as follows:—

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1st of May, 1848.

"Messrs. Hastie & Hutchinson.

"I inclose the bill of lading of 2396 Salonica killohs, equal to 9584 Constantinople killohs, or at 8½ ko. per quarter, 1179⁵⁷/₁₀₀ quarters Indian corn, per "Kezia Page," from Salonica, sailed on the 22nd of February; the freight as per charter-party is 8*s*. 6*d*. per quarter in full, and ten guineas gratuity. I shall be glad if you can obtain a good price for this cargo afloat, cost freight and insurance, but

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should not like to take less than 27*s*. The vessel may now arrive every day; and it would perhaps be as well to wait till she is off the coast, although there are seven lay days for unloading. As agreed upon between us, I will thank you to hand me a cheque to-day for 600*l*., as an advance on this cargo. The insurance has been effected at the "Indemnity" for 1600*l*., and the policy will be held at your disposal to the extent of your advance.

"I am, &c.,

"BERNOULLI."

On the same day, the defendants acknowledged the receipt of the bill of lading and charter-party by letter, inclosing a check for 600*l*., and which contained the following passage: "Against this cargo we beg to hand you check for 600*l*., it being understood that we have free hands as regards sale. We will thank you to send per bearer the policy of insurance on the cargo." The policy was accordingly forwarded to the defendants.

On the 15th of May, 1848, the defendants sold the cargo to one A. Callender, and sent to him the following bought note:—

"Bought of Hastie & Hutchinson a cargo of about 1180, say one thousand one hundred and eighty quarters of Salonica Indian corn, of fair average quality when shipped, per the "Kezia Page," Captain Page, from Salonica, bill of lading dated the 22nd of February, at 27*s*., say twenty-seven shillings per quarter, free on board, and including freight and insurance, to a safe port in the United Kingdom, the vessel calling at Cork or Falmouth for orders, measure to be calculated as customary, payment at two months from this date, or in cash, less discount at the rate of five per cent. per annum for the unexpired time, upon handing shipping documents."

On the same day, the defendants wrote to Messrs. Bernoulli, advising them of the sale, but without making any

mention of the purchaser or of commission. The vessel sailed from Salonica on the 23rd of February; and, having met with tempestuous weather, the cargo became so heated and fermented, that the vessel was obliged to put into Tunis Bay. On the 12th of April, the cargo was surveyed, and found to be so much damaged, that it was unfit to be carried further; and on the 24th it was sold by the master. On the 23rd of May, A. Callender gave the defendants notice that he repudiated the contract, on the ground that the cargo did not exist at the time of the sale to him. In March, 1849, a fiat in bankruptcy issued against A. Callender, and on the 17th of November, 1850, he obtained his certificate.

The plaintiffs tendered evidence to prove, that, by mercantile usage, when a cargo is sold "free on board," the purchaser takes upon himself all the risk and benefits of the owner, freight and insurance being included in the price which he agrees to pay. This evidence was objected to by the defendants' counsel, and rejected by the learned Judge. It was also objected, on behalf of the defendants, that they were not liable by reason of charging a *del credere* commission, inasmuch as there was no note in writing signed by them, within the 4th section of the Statute of Frauds. In directing the jury, the learned Judge ruled, that the contract imported that, at the time of the sale, the corn was in existence as such, and capable of delivery (*a*). The learned Judge also ruled, that the defendants were responsible by reason of their charging a *del credere* commission, although they had not guaranteed the plaintiffs by any writing signed by them as agents. A verdict having been found for the defendants, with leave to each party to move—

(*a*) At the suggestion of the Court in banc, it was arranged that, in the bill of exceptions allowed by them, the ruling of the Judge at Nisi Prius on this point

should be stated as if it had been in accordance with the opinion of the majority of the Court: See Judgment, p. 53.

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Cowling, in the following Term (January 13) obtained a rule nisi to enter a verdict for the plaintiffs on all the issues except those on the fifth and sixth pleas, and on those pleas for judgment non obstante veredicto, the amount of the verdict being the difference between the price of the corn and the sum advanced. And

Butt obtained a rule nisi to retain the verdict for the defendants, in case the Court should be of opinion in favour of the plaintiffs upon the first point—

The case was argued in last Easter Term (May 5th and 6th), when

Butt and *Karslake* shewed cause against the plaintiffs' rule, and were heard in support of the defendants'.—First, upon the true construction of the contract made between the defendants, as agents for the plaintiffs and Callender, the latter agreed to purchase a cargo of corn. This was, therefore, a contract for the sale of an existing chattel. But, at the time of the contract, the chattel, the subject-matter of that contract, was not in existence. The vendee, therefore, was not bound. The construction for which the plaintiffs must contend is, that the vendors, through their agent, merely disposed of the interest, whatever it might be, in that adventure, or, so to speak, that they sold and the purchaser bought the possibility of a cargo. But the sale of a cargo of Indian corn of about a certain quantity, and subject to certain conditions, was the true object of the transaction. In *Barr v. Gibson* (a), where the defendant sold the plaintiff a ship, it was held by this Court, that, as the ship existed in specie at the time of the contract, the defendant had in that respect fulfilled his engagement; and *Parke*, B., in delivering the judgment of the Court, says: "But the bargain and sale

(a) 3 M. & W. 390.

of a chattel, as being of a particular description, does imply that the article sold is of that description, for which the cases of *Bridge v. Wain* (a), and *Shepherd v. Kain* (b), and other cases, are authorities; and therefore, the sale in this case of *a ship* implies a contract that the subject of the transfer did exist in the character of a ship; and the express covenant that the defendant had power to make the bargain and sale of the subject before mentioned must operate as an express covenant to the same effect."—[*Parke, B.*—According to the defendants' construction of this contract, they would be liable for the payment of the price, provided the corn had existed in specie at the time of the contract, although its value had been merely nominal. *Pollock, C. B.*—This question is purely one of construction. I certainly think that the plain and literal meaning of the language here used imports that the thing sold, namely, the cargo, was then in existence, and capable of being transferred. In a recent case (c), where the plaintiff had purchased an annuity, which, at the time of the sale, had ceased to exist, and had paid the purchase-money, we held that he was entitled to recover back the amount so paid in an action of money had and received, on the ground of want of consideration. Suppose that in the present case the cargo had been thrown overboard, would the purchaser have been entitled to recover the amount of it under the policy of insurance?] It is submitted that he would not. If the plaintiffs themselves had previously given an order for the sale of the cargo at Tunis, they could not have enforced this claim, upon the same ground as that upon which the defendants now rest their defence, viz. that the chattel did not exist which they professedly and specifically agreed to sell.

Secondly, the contract under which the plaintiffs seek to render the defendants liable was not in writing, as re-

(a) 1 Stark. N. P. 504.

(b) 5 B. & Ald. 240.

(c) *Strickland v. Turner*, 7 Exch. 208.

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quired by the 4th section of the Statute of Frauds. In Smith's Mercantile Law, p. 111, it is said: "It was at one time thought that an agent acting under a *del credere* commission was not merely a surety, responsible only in case of the default of the purchaser, but that he was liable to his principal in the first instance (a); but that doctrine has been questioned, and at last overturned by subsequent authorities (b), which have settled that he is but a surety." The true definition of the liability of a factor who acts upon a *del credere* commission, appears to be that which is given by Lord *Ellenborough*, C. J., in delivering the judgment of the Court of King's Bench in *Morris v. Cleasby* (c), that, "In correct language, a commission *del credere* is the premium or price given by the principal to the factor for a guarantee; it presupposes a guarantee. . . . But whatever term is used, the obligation of the factor is the same; it arises on the guarantee. The guarantor is to answer for the solvency of the vendee, and to pay the money if the vendee does not; on the failure of the vendee, he is to stand in his place, and to make his default good." In the American Courts, indeed, it has been held that the contract of a factor acting under the terms of a *del credere* commission is not within the Statute of Frauds: *Wolff v. Koppel* (d), *Swan v. Nesmith* (e). In the former of these cases, the judgment of the Court, delivered by *Cowen*, J., seems founded on the principle, that the factor is primarily liable (f). But in Smith's Mercantile Law, p. 416, the following passage seems to lay down the true rule:—"In a word, the question by which it must be tested, whether a contract be or be not within the statute, is, *what is the promise?* Is it a promise to answer for the debt, de-

(a) *Grove v. Dubois*, 1 T. R. 112; *Bize v. Dickason*, 1 T. R. 285; *Weinolt v. Roberts*, 2 Camp. 586.

(b) *Morris v. Cleasby*, 4 M. & S. 566; *Hornby v. Lacy*, 6 M. & S. 166; *Cumming v. Forrester*, 1

M. & S. 494; *Baker v. Langhorn*, 6 Taunt. 519.

(c) 4 M. & S. 574.

(d) 5 Hill's New York Rep. 458.

(e) 7 Pickering's Rep. 220.

(f) See post, p. 56, n.

fault, or miscarriage of another, for which that other remains liable? If so, it must be in writing." It is clear that the purchaser here is primarily liable, and the defendants were liable for the amount of this debt only upon their default. The point therefore seems to fall precisely within the definitions to be found in *Morris v. Cleasby* (a), and in Smith's Mercantile Law.

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Cowling, contra.—First, as to the meaning of the contract of the 15th May, 1848. It should be construed as it would be understood by mercantile men, taking into consideration the subject-matter of the bargain, and the circumstances under which it was made. By the bill of lading, the cargo was shipped "free on board," that is, it was to become the absolute property of the vendees, and to be carried at their risk: *Cavasjee v. Thompson* (b). What had become of the cargo after the vessel sailed, was unknown to the contracting parties; but both were aware that it was subject to perils of the seas, and that the shippers had endeavoured to protect themselves against loss by effecting a policy for the full value, which together with the bill of lading and charter-party were in the possession of the shippers' agent. There are two well-known modes of sale of such a cargo, namely, "afloat," which is the present case, which includes freight and insurance, and "to arrive." In the former case the purchaser takes upon himself all risk from the moment of sale at the least, and, it is submitted, during the whole term of the voyage; for it is immaterial to him whether the cargo was in existence at the time of, or prior to, the contract, if afterwards lost. Without insurance, he would, under an ordinary sale, be subject to the loss, if the cargo remained in specie, however much sea-damaged previously to the purchase, so long as it literally existed; but not if it were actually destroyed or lost, in which latter cases the vendor must bear the loss.

(a) 4 M. & S. 574.

(b) 5 Moore, P. C., 169.

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This would leave a divided risk between vendor and purchaser in respect of the part of the voyage prior to the sale, which would be an unmerchantable mode of dealing. The vendor having taken a policy to protect himself against sea risk, as far as practicable, the most reasonable course would be, that the purchaser should take all risks prior to the purchase, and receive the policy for the purpose of indemnifying himself against them. It would protect him from most of the risks to which he would not have been liable without it. Therefore, the fact of his buying the policy is strong evidence that he took on himself all sea risks from the time of the vessel sailing. The language of the bought note shews that the purchaser so intended, and mercantile evidence of its meaning was superfluous. The term "cargo" does not necessarily imply a cargo existing at the time of the bargain, but, as explained by the context, a cargo of fair average quality *when shipped*—thus regarding solely its condition at the time of shipment, and treating as immaterial what might afterwards occur to depreciate its quality. The *freight and insurance* also refer to the time of sailing, and not merely to that of the bargain. Again, the payment is by bill at short date, irrespective of delivery; so that the purchaser would probably have to part with his money before he could ascertain whether the cargo existed. Again, the payment and receipt of the shipping documents are to be contemporaneous acts. The meaning of such a transaction can only be, that the purchaser is to stand in the situation of the vendor, and take upon himself all risk from the time of the vessel sailing, looking to the policy for indemnity. The use of the term "cargo" is no guarantee of its existence: Com. Dig. "Covenant" (A 4). If the vendee had paid the purchase money, he could not have recovered it back, since the consideration did not wholly fail, for part of it was the delivery of the shipping documents, including the policy; nor could he have alleged that the payment was made under a mistake. The con-

tract really was for the purchase of those documents, and the chance of that cargo being in existence, which was shipped on the 22nd February. The contract was not defeated by the sale of the corn, for that was necessary in order to prevent further loss. If the captain, instead of selling it, had brought it home in a rotten state, that would not have affected the contract; then how can a sale for the purchaser's benefit?

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The Court then said, that it was unnecessary to hear any argument on the other points, and that the plaintiffs were clearly entitled to judgment non obstante veredicto on the sixth plea.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—[His Lordship, after stating that the following was the judgment of his Brother *Alderson* and of himself, and that the Lord Chief Baron differed in opinion from the rest of the Court upon the construction of the contract, and therefore the rule would be absolute for a new trial, with liberty for the defendants to bring the case before a Court of error, by a bill of exceptions, proceeded:—The only questions now to be disposed of are, first, what is the meaning of the contract made between the defendants, as agents for the plaintiffs, with Callender; and secondly, whether the defendants are liable for the non-fulfilment of that contract, by reason of their *del credere* commission, there being no guarantee in writing.

All the questions asked as to mercantile usage in such a contract, which were rejected, having in our opinion been properly rejected, and that which was answered, namely, as to the meaning of "free on board," throwing no light upon the construction of the instrument, we must look to the words of the contract only, in order to determine its meaning. The bought note inclosed in the letter of advice by the defendants to the plaintiffs is in these terms:

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—"Bought of Hastie and Hutchinson, a cargo of about 1180, say one thousand one hundred and eighty quarters of Indian corn, of *fair average quality when shipped*, bill of lading dated 27th of February, at 27*s.* per quarter, *free on board*, and including freight and *insurance*, to a safe port in the United Kingdom, vessel calling at Cork or Falmouth, payment at two months from this date upon handing over *shipping documents*." We think it is to be collected from this document, that the risk was to be the purchaser's from the date of shipment.

It is very true, that, when there is a sale of a specific chattel (not a contract to sell and deliver a chattel in futuro), there is an implied undertaking that it exists; and if there were nothing in this case but a bargain and sale of a certain cargo on the 15th of May, there would be an engagement by the vendor, or a condition, that the cargo was in existence at that time; but in this case there is a great deal more. There is an express engagement that the cargo was shipped on the 27th of February:—no express engagement that it was *then*, at the time of the contract, on board. There is an express engagement that the cargo was of average quality *when shipped*, so that it is clear that the purchaser was to run the risk of all subsequent deterioration by sea damage or otherwise, for which he was to be indemnified by having the cargo fully insured; for the 27*s.* per quarter was to cover not merely the price, but all expenses of shipment, freight, and of *insurance*, which means insurance to the full amount; and there is an implied contract, to the effect that the insurances are sufficient, by the vendor, and that insurance was clearly to be for the benefit of the purchaser, not merely to protect him from subsequent losses, but from losses prior to the date of the contract; for otherwise he would run the risk of intermediate partial damage, without any chance of indemnity at all. If then the damage was such as to be covered by an ordinary policy, for instance, if the ship should be at any time stranded during that voyage, the

full amount would be recoverable on the ordinary policy. Now, if an average loss were recoverable, why not a total loss? How could there be, without express words, an assignment of the benefit of the policies to the vendee, in case there was an average loss only, but not if a total loss? They are surely meant to be assigned for all purposes. Being thus entitled to have the cargo if it existed, and a full indemnity by the policies if it did not, the purchaser was bound to pay the stipulated price in a certain time after the bill of lading and other shipping documents were handed over. We think, therefore, that the true meaning of the contract was, that the purchaser bought the cargo, if it existed at the date of the contract; but if it had been damaged or lost, he bought the benefit of the insurance, but no more.

If, indeed, the vendor, before the date of the contract, had simply sold to another, he could not recover. By selling the cargo, he undertakes that the vendee shall have it if it exists, and that he himself had not before sold it to another. Such a contract is implied in every assignment; and if the vendor had, at the date of the contract, really sold to another, and precluded himself from delivering it according to his contract, he would be responsible. But the sale in this case, by the agent of the plaintiffs, was not such a sale as to defeat the contract. It was rendered necessary in consequence of the sea damage, and was made merely to prevent the loss being so great as it would otherwise have necessarily been. We therefore think that the fifth issue should be found for the plaintiffs.

The other and only remaining point is, whether the defendants are responsible by reason of their charging a del credere commission, though they have not guaranteed by writing signed by themselves. We think they are. Doubtless, if they had for a per-centage guaranteed the debt owing, or performance of the contract by the vendee, being totally unconnected with the sale, they would not be

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liable without a note in writing signed by them; but being the agents to negotiate the sale, the commission is paid in respect of that employment; a higher reward is paid in consideration of their taking greater care in sales to their customers, and precluding all question whether the loss arose from negligence or not, and also for assuming a greater share of responsibility than ordinary agents, namely, responsibility for the solvency and performance of their contracts by their vendees. This is the main object of the reward being given to them; and though it may terminate in a liability to pay the debt of another, that is not the *immediate* object for which the consideration is given; and the case resembles in this respect those of *Williams v. Leper* (a) and *Castling v. Aubert* (b). We entirely adopt the reasoning of an American Judge (Mr. Justice Cowen), in a very able judgment on this very point in *Wolff v. Koppel* (c).

(a) 3 Burr. 1806.

(b) 2 East, 325.

(c) The case, as reported in 5 Hill, N. Y. Rep., 458, is as follows:—

Error to the New York C. P., where Koppel sued Wolff and Henricks, to recover the price of certain goods, alleged to have been sold by the latter as factors acting under a del credere commission. The agreement del credere was by parol; and one point made in the Court below was, that the defendants' engagement, not being in writing, was void by the Statute of Frauds. The Court held otherwise; and after judgment in favour of the plaintiff, the defendants sued out a writ of error.

T. J. Brady for the plaintiffs in error.

E. C. Benedict for the defendant in error.

By the Court, *Cowen, J.*—It is objected that the contract of a factor, binding him in the terms implied by a del credere commission, is within the Statute of Frauds, and should therefore be in writing. Such is the opinion expressed by Theobald (Pr. & S. 64, 65), and in Chit. on Contracts, 209, 10th Am. ed. of 1842. The question was also mooted in *Gall v. Comber* (1 B. Moore, 279), but not decided, as seems to be implied in the careless manner in which the case is quoted by Chitty (8 Taunt. 338, S. C.). All the authority presented on the argument grows out of the nature of the contract, as held by the Court of King's Bench in *Morris v. Cleasby* (4 M. & Sel. 556, 574, 575). That case certainly defines the liability of the factor somewhat differently from what several previous cases seem to have done. The effect of acting under the

We are therefore of opinion, that the rule should be absolute to enter a verdict for the plaintiffs on all the issues.

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commission is said to be, that the factor becomes a guarantor of the debts which are created, that is to say, they are debts due to the merchant, and the factor's engagement is secondary and collateral, depending on the fault of the debtors, who must first be sought out and called upon by the merchant. (See also *Hornby v. Lacy*, 6 M. & Sel. 166, 171, 172; *Peele v. Northcote*, 7 Taunt. 478, 484; 1 B. Moore, 178, S. C.; *Leverick v. Meigs*, 1 Cowen, 645, 664.) On this we have the opinion of learned writers, that if the agreement *del credere* be made without writing, the case comes within the statute. On the other hand, approved writers assert that this is not so. (1 Beawes 46, 6th London ed.; 3 Chit. Commercial Law, 220, 221.) It is true, these latter go on the more stringent obligation supposed by Lord *Mansfield*, that of a principal debtor on the part of the factor, the accessorial obligation lying rather on the purchaser. This view of the matter was no longer correct, after the cases I have mentioned were decided. The consequence sought to be derived, however, by writers, is merely speculative, and the contrary has of late been directly held by the Supreme Court of Massachusetts in *Swan v. Nesmith* (7 Pick. 220). It is said, this was without the Court being aware of *Morris v. Cleasby*. Be that as it may, they seem to

have been fully aware of the rule laid down in that case, and to have recognised it as correct. They considered the obligation as a guaranty. But a guaranty, though by parol, is not always within the statute. Perhaps, after all, it may not be strictly correct to call the contract of the factor a guaranty, in the ordinary sense of that word. The implied promise of the factor is merely that he will sell to persons in good credit at the time; and in order to charge him, negligence must be shewn. He takes an additional commission, however, and adds to his obligation that he will make no sales unless to persons absolutely solvent; in legal effect, that he will be liable for the loss which his conduct may bring upon the plaintiff, without the onus of proving negligence. The merchant holds the goods, and will not part with them to the factor without this extraordinary stipulation; and a commission is paid to him for entering into it. What is this, after all, but another form of selling the goods? Its consequences are the same in substance. Instead of paying cash, the factor prefers to contract a debt or duty which obliges him to see the money paid. This debt or duty is his own, and arises from an adequate consideration. It is contingent, depending on the event of his fail-

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ing to secure it through another —some future vendee, to whom the merchant is first to resort. Upon non-payment by the vendee, the debt falls absolutely on the factor. As remarked by *Parker, C. J.*, in *Swan v. Nesmith*, the form of the action does not seem to be material in such case; it is to say whether the merchant sue for goods sold, or on the special engagement. The latter is perhaps the settled form; but still the action is in effect to recover the factor's own debt. In the late case of *Johnson v. Gilbert* (4 Hill, 178), the defendant, in consideration of money paid for him by the plaintiff, assigned a chattel note and guaranteed its payment. In such a case, the declaration must be on the guaranty to pay the debt, the debt of another; but this is so in form merely. We held that the contract was to pay the defendant's own debt, that it was not a contract to pay as the surety of another. All such contracts, and many others, are in form to pay the debt of another, and so literally within the statute, but without its intent. A promise by A. to B. that the former will pay a debt due from the latter, is not within the meaning, though it is

within the words: (*Conkey v. Hopkins*, 17 John. 113; *Eastwood v. Kenyon*, 11 Ad. & El. 438.) So are a numerous class of cases where the promise is made in consideration of the creditor relinquishing some lien, fund, or security: (Theobald's Pr. & S., 45, and the cases there cited.) The merchant gives up his goods to be sold, and pays a premium. Is not this in truth as much and more than many of those cases require, which go on the relinquishment of a security? Suppose a factor agrees by parol to sell for cash, but gives credit. His promise is, virtually, that he will pay the amount of the debt he thus makes. Yet, who would say his promise is within the statute? The amount of the argument for the defendant would seem to be, that an agent for making sales, or indeed a collecting agent, cannot, by parol, undertake for extraordinary diligence, because he may thus have the debt of another thrown upon him. But the answer is, that all such contracts have an immediate respect to his own duty or obligation. The debt of another comes incidentally as a measure of damages.

Judgment affirmed.

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HICKIE and Another v. SALAMO and Another.

June 26.

GRAY moved (a) for a rule, calling on the defendants to shew cause why the plaintiffs should not have their costs under the 13 & 14 Vict. c. 61, s. 13. It appeared on the affidavits that this was an action of debt, which had been brought in this Court, and had been tried under a writ of trial; and that the plaintiffs had recovered a verdict for 8*l.* 12*s.* 6*d.* only, but that one of the plaintiffs dwelt at a place within twenty miles of the defendants, and the other plaintiff beyond that distance.—By the 128th section of the 9 & 10 Vict. c. 95, the superior Court has concurrent jurisdiction “where the plaintiff dwells more than twenty miles from the defendant.” It is submitted, on the part of the plaintiffs, that where one of two or more plaintiffs dwells beyond the prescribed distance from the defendants, the plaintiffs are entitled to have costs awarded to them under the 13 & 14 Vict. c. 61, s. 13. The object of the 128th section was to provide for cases where any of the plaintiffs or of the defendants may have to come a considerable distance. If the defendants’ position be correct, the superior Courts would not have concurrent jurisdiction if one of twenty plaintiffs happened to dwell within twenty miles of the defendants, and all the other plaintiffs at a distance of 500 miles. In *Doyle v. Lawrence* (b), it was held, that where some only of several defendants reside within the jurisdiction of the County Court within which the cause of action arose, the superior Courts have concurrent jurisdiction with the County Court. The same rule must apply to plaintiffs. In that case, *Cresswell*, J., says, “The burthen of argument is on those seeking to make the rule absolute, because the plaintiffs were, till the recent Act, (13 & 14 Vict. c. 61), entitled to costs,

Where one of several plaintiffs dwells more than twenty miles from the defendant, the Superior Courts have concurrent jurisdiction with the County Court.

(a) May 7.

(b) 2 L. M. & P. 368.

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unless it were shewn that their costs were taken away." Here the onus is upon the defendants. The only difficulty which is likely to arise proceeds from the interpretation clause, sect. 142 of the 9 & 10 Vict. c. 95, which enacts, that "in construing this Act, every word importing the singular number shall, where necessary to give full effect to the enactments herein contained, be understood to mean several persons or things as well as one person or thing." [*Platt*, B.—You contend that the whole plaintiff does not dwell within the distance. *Parke*, B.—On the other hand, if the word plaintiff is to be read plaintiffs, they do not dwell beyond the distance.] This language has been adopted for the sake of brevity. There is no *necessity* to call in aid the interpretation clause, for the purpose of giving full effect to the 128th section.

Petersdorff shewed cause, in the first instance.—The plaintiffs are bound to bring the case within the 128th section. Although a plaintiff was formerly *primâ facie* entitled to his costs in case of success, under the statute of Gloucester, yet that right is taken away, in certain cases, by the 129th section. The term "the plaintiff," in the 128th section, means the parties to the suit, that is, the suitors. It has been held, that where there are several defendants, it must be shewn that they all reside *within* the jurisdiction of the County Court; and so in the case of several plaintiffs, it must be shewn that all the plaintiffs dwell *beyond* the distance. If the argument be correct, that the 128th section was meant to provide for the case where one of several plaintiffs dwells more than twenty miles from the defendant, on account of the distance to be travelled by that party, plaintiffs ought to have their costs whenever any witness lives at a very considerable distance from either of the parties to the suit.

Gray was heard in support of the rule.—[*C. E. Pollock* referred, as amicus Curie, to *Parry v. Davies* (a).]

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Cur. adv. vult.

The judgment of the Court was now delivered by

PLATT, B.—In this case, the plaintiffs having recovered in this Court a verdict for a sum recoverable in the County Court, moved for their costs of suit.

One of the plaintiffs, at the commencement of the action, dwelt at a distance greater, and the other at a distance less, than twenty miles from the defendant.

On shewing cause, the counsel for the defendant objected that the plaintiffs did not bring themselves within the predicament prescribed by the 9 & 10 Vict. c. 95, s. 128; for if they were considered as constituting one plaintiff, or, according to the interpretation clause, sect. 142, as being two plaintiffs, it could not be predicated of them that they dwelt more than the distance of twenty miles from the defendant, as in either case they dwelt as much within as beyond that distance; that theirs might be casus omisus; and that unless they came within the language of the 128th section, the Court had no jurisdiction to grant the costs in question.

By the 9 & 10 Vict. c. 95, s. 128, it is enacted, that all actions which, before the passing of that Act, might have been brought in any of her Majesty's superior Courts of record, where the plaintiff dwells more than twenty miles from the defendant, may be brought and determined in any such superior Court at the election of the party suing, as if that Act had not been passed.

Under this Act, the defendant applied to the Court, under the 129th section, in order to deprive the plaintiff of his costs, upon an affidavit stating, amongst other

(a) 1 L. M. & P. 379.

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things, that he and the plaintiff dwelt within the prescribed distance from each other.

This practice was changed by the 13 & 14 Vict. c. 61, which deprived the plaintiff of his costs if the cause of action should be within the jurisdiction of the County Court, unless the Judge who tried the cause should certify under the 12th section, or the plaintiff should, in pursuance of the 13th section of that Act, make it appear to the satisfaction of the Court in which such action was brought, or to the satisfaction of a Judge at Chambers upon summons, that the said action was brought for a cause of action in which concurrent jurisdiction is given to the superior Courts by the 128th section of the 9 & 10 Vict. c. 95 ; in which case, the Court in which the action is brought, or a Judge at Chambers, may, by rule or order, direct that the plaintiff shall recover his costs.

Under the 13 & 14 Vict. c. 61, therefore, the plaintiff must apply to obtain his costs ; but surely the facts which would have enabled him to resist successfully the defendant's application to deprive him of costs under the 9 & 10 Vict. c. 95, would, under the 13th section of 13 & 14 Vict. c. 61, suffice to establish his right to recover them.

The cases in which that right is to attach are not changed,—they are still those in which concurrent jurisdiction is given to the superior Courts by the 128th section of the 9 & 10 Vict. c. 95. The same state of facts, therefore, which would have entitled the plaintiff to his costs before the passing of the 13 & 14 Vict. c. 61, would, provided he satisfied the Court or a Judge of their existence, equally entitle him to costs now. In *Parry v. Davies and Wife* (a), the affidavit on behalf of the defendants omitted to state that more than one of them resided within twenty miles of the plaintiff. Lord *Cranworth*, then Baron *Rolfe*, held that the 128th section of the 9 & 10

(a) 1 L. M. & P. 379.

Vict. c. 95, gave to the superior Courts a concurrent jurisdiction, and that the plaintiff was entitled to his costs. In *Doyle v. Lawrence and Others (a)*, the Court of Common Pleas adopted Lord *Cranworth's* decision, and held that the residence of one of the defendants, more than twenty miles from the plaintiff, made that case one of concurrent jurisdiction within the same section. The same principle must apply to a plurality of plaintiffs. We therefore think, that as one of the plaintiffs in this case resided more than twenty miles from the defendant, the jurisdiction was concurrent, and that the plaintiffs are entitled to their costs. The rule, therefore, will be absolute.

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Rule absolute.

(a) 2 L. M. & P. 368.

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IN this case the defendant had been arrested under a warrant issued by Mr. Daniell, Commissioner in Bankruptcy for the Birmingham District, under the provisions of the 14 & 15 Vict. c. 52 (the Absconding Debtors Arrest Act). The warrant was dated the 4th of May, and the defendant was arrested on the 5th, and carried to the county gaol, where he was detained until the 11th, when he was discharged; but on his way to the train by which he was about to return home, he was again arrested under a capias issued by leave of *Crompton, J.*, in respect of the same debt, and upon the same materials as were before the Commissioner of Bankruptcy. He was afterwards discharged by the order of *Alderson, B.*, on depositing in Court the amount indorsed on the writ with 10*l.* for costs in lieu of bail, with liberty to apply to the Court.

Under the Absconding Debtors Act, 14 & 15 Vict. c. 52, the capias must be issued and served within seven days after the warrant is obtained, where the capias is issued upon the same materials as the warrant; and if not so issued and served, the capias and warrant are both void, and the debtor is entitled to his discharge; or if he has deposited money under the statute, he is entitled to a which need not

return of it. This rule does not apply to a capias obtained upon fresh materials, be executed within the above-named period.

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Field now moved for a rule calling on the plaintiff to shew cause why the money so deposited should not be repaid to the defendant.—The defendant is entitled to the return of his money, upon one or both of the two following grounds: either the writ of *capias* was not justified by the 14 & 15 Vict. c. 52 (a), or upon general principles he was

(a) The following sections are material to the present question:

Sect. 1. "That, from and after the passing of this Act, it shall be lawful for any Commissioner of the Court of Bankruptcy acting for any district in the country, or the judge of any district County Court, except the County Court judges acting in the counties of Middlesex and Surrey, on application by or on behalf of any creditor, upon due proof by affidavit, intituled in one of her Majesty's superior Courts of common law, of the creditor applying, or of some other person, or by solemn affirmation, in cases in which solemn affirmation is allowed by law, to the satisfaction of such Commissioner or Judge, that a debt of 20*l.* or upwards is owing to such creditor, and is then payable from the person or persons against whom such application shall be made, and that there is probable cause for believing that such debtor or debtors, unless he or they be forthwith apprehended, is or are about to quit England, with intent to avoid or delay the said creditor, or with intent to remain out of the jurisdiction of the Courts of law in England, so long that thereby the said creditor will or may be delayed in the recovery of the said debt, to grant a warrant,

such warrant being in the form and indorsed in the manner specified in the Schedule (A.) to this Act annexed, or to the like effect, to the messenger of the said Court of Bankruptcy, or to the high bailiff of the said County Court, whereby the said messenger or high bailiff shall have authority at any time within seven days after the date of the said warrant, including the day of such date, to arrest the person or persons named in such warrant, and him or them safely keep until he or they shall have given bail to such messenger or high bailiff, or made deposit with him according to the practice observed in the superior Courts of law, or until he shall have paid the debt and costs indorsed on the said warrant, or be otherwise discharged from arrest under such warrant by due course of law; and that such warrant shall bear date the day of the issuing thereof, and may be executed in any part of England; and that a copy of such warrant or warrants shall, at the time of the arrest, be served upon the party arrested: Provided always, that every creditor who shall cause such warrant to issue, shall forthwith cause to be issued a writ of *capias*, and also in cases where no action shall be pending, shall, before the issuing of

improperly arrested twice for the same cause. First, it is clear from the several sections of the Act which bear upon

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such writ of *capias*, cause a writ of summons to be issued out of some one of the superior Courts of law against such debtor or debtors; and that, upon such *capias*, all mandates and warrants shall issue according to the practice now in use, notwithstanding that the defendant shall have been arrested by virtue of any warrant or warrants granted by such Commissioner or Judge; and such debtor or debtors shall, if in custody, be served with such writ of *capias* within seven days from the date of such warrant, including the day of such date; and thereupon such debtor or debtors shall be considered and deemed to have been arrested by virtue of the said writ of *capias*, and all proceedings shall be had upon such writ of *capias* as if the same had been issued prior to the issuing of such warrant, and the arrest made on such writ of *capias* and according to the practice now observed in the said superior Courts of law."

Sect. 3. "The warrant or warrants which shall be issued by virtue of this Act, shall be auxiliary only to the processes now in use, and shall be wholly void and of none effect whatsoever as a protection to the person on whose behalf such warrant shall have issued, unless such writ of *capias* shall be issued and served in manner aforesaid."

Sect. 5. "It shall be lawful for any person arrested upon any

such warrant forthwith, before the issuing of the said writ of *capias*, to pay the debt and costs which shall be indorsed on such warrant to the said messenger or high bailiff as aforesaid, or to enter into a bail bond to such messenger or high bailiff, with two sufficient sureties, for the amount which shall be indorsed on such warrant, conditioned to put in special bail as required by the said warrant, or to make deposit of the sum indorsed on such warrant, together with 10*l.* for costs, and thereupon he shall be entitled to be discharged from custody, and such messenger or high bailiff is hereby authorised to discharge such person accordingly."

Sect. 6 "As soon as the person so arrested as aforesaid has been taken into custody or detained under the writ of *capias* hereinbefore mentioned, the force and effect of the said warrant so granted as aforesaid shall immediately cease and determine, and the said sheriff shall hold the said person under or by virtue of the said writ of *capias* in like manner as if the said person had been first arrested under and by virtue of the same, or in case the person so arrested shall have made deposit with the said messenger or high bailiff as aforesaid, or entered into such bail bond as aforesaid, then upon delivery to the messenger or high bailiff respectively, by whom

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this precise question, that the writ of *capias* was not issued and served within the period prescribed by the first section. That section requires the creditor, if there be no fresh materials in the case, to cause a *capias* to be issued forthwith. And by the proviso to the sixth section, if no writ of *capias* be issued and served within seven days of the date of the warrant, the party arrested under the warrant is entitled to his discharge if in custody, or to a return of his money where he has deposited it under the Act.

Secondly. By the third section, the warrant is wholly void, where a writ of *capias* has not been issued and served according to the terms of the Act. Here the detention of the defendant was illegal. The gaoler no doubt would be liable for false imprisonment for the whole of the period during which this defendant was in custody. The arrest under the *capias* was in effect a second arrest for the same cause, and the principle applies that *nemo bis vexari debet pro unâ et eâdem causâ*. For this also the rule of Michael-

such person was arrested, of a copy of the warrant granted by the sheriff upon such writ of *capias* as aforesaid, the said messenger or high bailiff shall pay over to such sheriff as aforesaid the said deposit, or assign to the said sheriff such bail bond as aforesaid, and the said sheriff shall then hold the said deposit or bail bond, and shall be entitled to enforce the said bail bond in his own name, or to assign the same in the same manner as if the said person had been first arrested on the said writ of *capias*, and the said deposit had been made or bail bond entered into with the said sheriff: Provided always, that the said sheriff shall not be in any manner

liable or answerable for any default, misbehaviour, or miscarriage of the person to whom such warrant was addressed, or of the person or persons making the arrest under and by virtue of the said warrant: Provided also, that if no writ of *capias* be issued and served within seven days from the date of the said warrant, including the day of such date, the person arrested under such warrant shall be entitled to be discharged from custody, or in case the deposit has been made or bail bond given to the said messenger or high bailiff, then the said deposit shall be returned, and the said bail bond given up to be cancelled."

mas Term, 15 Car. 2, sect. 2, specifically provides. Moreover, as the detention was *illegal*, the defendant was privileged from arrest *redeundo*: *Birch v. Prodger* (a), *Loveridge v. Plaistow* (b), *Barratt v. Price* (c), *Anon.* (d), *Goodman v. London* (e), *Hall v. Hawkins* (f), *Imlay v. Ellefsen* (g).

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Phipson shewed cause in the first instance.—The cases cited have no direct application to the present question, which chiefly turns upon the enactments of this particular statute. The first section clearly contemplates the possibility of the debtor being arrested twice. The effect of the third section is to invalidate the *warrant* if the *capias* be not issued in accordance with the requirements of the Act; but still it is silent as to the *capias*. Here the plaintiff is not shewn to have been any party to the wrongful detention of the defendant beyond the proper time. The party in fault may be liable for that act. But the *capias* is not void. If the defendant's argument be correct, wherever a warrant has been issued under this Act, the *capias* must be executed within the limited period of seven days, which would have the effect of repealing the 1 & 2 Vict. c. 110. The arrest was therefore regular.

Cur. adv. vult.

The judgment of the Court was now delivered by

ALDERSON, B.—This was an application to restore to the defendant the sum deposited in lieu of bail in this case. It appeared on the affidavits that, under the provisions of the 14 & 15 Vict. c. 52, s. 1, an application had been made to a Commissioner of Bankruptcy in the country, founded on certain facts as to the defendant's intention of leaving the country; and a warrant in due form issued, for

(a) 1 N. R. 135.

(b) 2 H. Blac. 29.

(c) 9 Bing. 566.

(d) 1 Dowl. 157.

(e) 2 Dowl. 504.

(f) 4 M. & W. 591.

(g) 2 East, 453.

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apprehending him and lodging him in gaol. The parties then proceeded, and, as we must presume, on the same facts, to sue out a writ of summons, and to apply for a *capias* to be issued from this Court, in order that the defendant might be treated as arrested under such *capias*, and all the proceedings taken under the Commissioner's warrant be treated as proceedings under such writ of *capias*. By the Act this is required to be done within the space of seven days after the date of the Commissioner's warrant. This was not done. The gaoler, after detaining the defendant in custody for the seven days, and even longer, (an excess which does not seem material to our judgment, although unquestionably utterly indefensible,) discharged him from custody. He was after this apprehended under the *capias*, and detained until he made the deposit, for the return of which this application was made. We think the rule must be made absolute. This *capias* was applied for, not on independent grounds, but on the same grounds on which the Commissioner's warrant was originally obtained. It is in truth a part of, and a completion of that proceeding; and inasmuch as it did not comply with the Act by being issued and served within the limited time, we think that the defendant could not legally be arrested and detained under it. The sixth section of the Act provides, that all the proceedings as to making a deposit, or giving bail under a writ of *capias*, may take place under the Commissioner's warrant, but subject to the proviso, that if the writ of *capias* applied for does not arrive, and is not served within the limited seven days, the deposit shall be restored and the bail bond cancelled; and we think that the legislature could not mean that this should be so, and yet that, if the writ of *capias* came down a little too late, the deposit should be made again, or a fresh bail bond then given. We think, therefore, that this falls within the principle of not allowing a defendant *bis vexari pro eâdem causâ*; and that the *capias* thus applied for to lega-

lise the proceedings under the warrant, and on the same grounds as those on which the warrant itself was granted, falls with the warrant, unless it be granted and served within the seven days limited by the Act. We do not say that no fresh *capias* can issue; on the contrary, if applied for on fresh grounds at any time afterwards, it will be valid, and the defendant may be lawfully detained under it. This will not be a second arrest *pro eâdem causâ*. In the present case, we are of opinion that this rule must be for this reason made absolute.

The other grounds on which it was applied for seem to us to be untenable, and the rule will be absolute, but without costs.

Rule absolute without costs.

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TRESPASS for entering a close of the plaintiff, and for pulling down a stable of his. The defendant pleaded, that he was possessed of a dwelling-house adjoining the plaintiff's close, and was entitled to have the light and air enter through a certain ancient window therein; that the stable wrongfully and unlawfully obstructed the light and air, and darkened the window; wherefore he entered the plaintiff's close and pulled down the stable, to remove the obstruction.

To this plea the plaintiff replied *de injuriâ*, and the defendant demurred specially, setting forth the usual cause of demurrer to such a replication. Joinder in demurrer.

To an action of trespass for entering a close of the plaintiff's, and pulling down a stable, the defendant pleaded that he was possessed of a dwelling-house adjoining the plaintiff's close, and was entitled to have the light and air enter through a certain ancient window therein; that the stable wrongfully and unlawfully ob-

structed the light and air and darkened the window, wherefore he entered the plaintiff's close and pulled down the stable to remove the obstruction. To this plea the plaintiff replied *de injuriâ*:—*Held*, on special demurrer, that the replication was good, as the plea consisted merely of excuse; that it neither claimed any interest in the plaintiff's land, nor set up such a right by virtue of an authority from the plaintiff, within the true meaning of the rule which precludes the adoption of this general form of replication.

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The case was argued in last Term (June 8), by
Cleasby, for the defendant, in support of the demurrer;
 and by

Lush in support of the replication.

[They cited *Crogate's case* (a), and the second and third resolutions therein; *Palmer v. Fletcher* (b), *Plasterers' Company v. Parish Clerks' Company* (c), and *Bowler v. Nicholson* (d).]

Cur. adv. vult.

The judgment of the Court was now delivered by

ALDERSON, B.—This was a demurrer to a replication de injuriâ. The action was trespass. [His Lordship, after stating the pleadings as set forth at the commencement of the report, proceeded:] We are of opinion that the replication is good. The learned counsel on both sides appealed to *Crogate's case* (e), as laying down the rule, that such replication was proper, “when the plea consisted merely of excuse, and upon no matter of *interest* or of *authority* or *power*, mediately or immediately derived from the plaintiff.” It was argued on behalf of the defendant, first, that the plea claimed an interest in the nature of a negative easement upon the plaintiff's land, namely, to have no obstruction there to his window; and secondly, that he could only have the right to the light and air through the window, by virtue of an authority from the plaintiff. But we think that this plea claims no interest, and sets up no authority from the plaintiff in the sense laid down in the above rule, which excludes the replication de injuriâ. We think the interest which excludes the replication, is an interest of

(a) 8 Rep. 66 b.
 (b) 1 Lev. 122.
 (c) 6 Exch. 630.

(d) 12 A. & E. 341.
 (e) 8 Rep. 66 b.

the defendant in the land of the plaintiff, as to a common or rent out of the land, or to a way or passage over the land; and the authority which excludes must be an authority pleaded as coming from the plaintiff, and given to the defendant to do the act which is justified (*a*). The plea in the present case claims no interest in or profit to arise out of the land, but only claims a right on the part of the defendant to enjoy his own land in a given way, and without inconvenience or any nuisance erected on the plaintiff's land. Nor does it at all shew that the defendant's right to do the act complained of arose out of any authority given by the plaintiff or those under whom the plaintiff claims, as in the case of a right of way in which the going on the land to do the act complained of arises, either directly, in the exercise of the authority given to go on the plaintiff's land, or indirectly, where, there being an obstruction, it is removed in order to facilitate the exercise of the right of way given. Here the plea only shews a lawful excuse given by law to the defendant for entering the plaintiff's land and pulling down the stable there, because it was a nuisance and obstruction to the right he has to enjoy his own land without inconvenience. This is a plea, therefore, merely of excuse, and the plaintiff had a right to reply *de injuriâ* to it. Our judgment, therefore, must be for the plaintiff.

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Judgment for the plaintiff.

(*a*) 2 Saund. 294, n. 1.

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DEBT by the plaintiff, as clerk to the Commissioners of the Eaw Brink Navigation, for carrying into execution, and acting under, the 45 Geo. 3, c. lxxii. The first count of the declaration stated, that, on the 27th of December, A. D., 1849, by a certain indenture then made between the said Commissioners, to wit, being five of certain Commissioners of Navigation acting in execution of several Acts of Parliament, viz. 35 Geo. 3, c. lxxvii., and of the several Acts subsequently passed for amending &c. the original Act, which said several Acts are generally called the Eaw Brink Acts, of the one part, and the defendant of the other part, (profert); after reciting, as the fact was and is, that by an Act &c. (according to the powers given to the Commissioners by the 1 & 2 Will. 4, c. lxxiii. s. 36; see note, post, p. 76); and further reciting, that the said Commissioners, at their respective general meeting held in the then present year, pursuant to directions of the said Acts, passed orders directing that the said tolls should be let by auction under the said powers, and that the proper notices of the intention of letting the said tolls had been duly given, &c.; and that at a meeting of the said Commissioners, held at &c., on the 4th of December, the said tolls were, in pursuance of the same notices, offered to be let by public auction for the term of one year from the 1st of January then next, subject to certain conditions then and there produced; and that the defendant was then declared to be the highest bidder for the same, at the rent of 3470*l.*: It was by the said indenture witnessed, that, in

Debt upon an indenture, dated the 27th of December, 1849, alleged to have been made between five Commissioners of an inland navigation, under the authority of several Acts of Parliament, on the one part, and the defendant on the other part, whereby the Commissioners, as was alleged in the declaration, in consideration of the rent therein mentioned, demised the tolls of the said navigation to the defendant for one year, from the 1st of January, 1850, at the rent of 3470*l.*, payable monthly, together with certain other payments, and the defendant covenanted with the Commissioners, parties to the said indenture, and also with the whole body of the Commissioners of the navigation, as a separate covenant, for the due payment of the rent. The declaration then averred an entry by virtue of the demise, and the occupying and receiving the tolls during the entire year. Breach, the non-payment of the rent. Plea, that the Commissioners, the lessors named in the indenture, never executed the lease, and that the entry and occupation was at the will of the Commissioners only, and not under the demise. Replication, that the defendants had entered and had received and enjoyed the tolls, &c., by the permission of the Commissioners, under the terms of the indenture:—*Held*, that, as the lessors had not executed the lease, the lessee had never received the consideration for which he had stipulated, namely a permanent estate during the demise, and under its terms; and therefore, that he was not liable to be sued upon his covenant in that instrument.

consideration of the premises, and pursuant to and in exercise of the power or authority to the said Commissioners for that purpose given by the said recited Act, and every other power and authority whatever in anywise enabling them in this behalf; and also in consideration of the rent thereafter reserved, and of the several covenants and agreements thereafter contained, on the part of the defendant to be paid, observed, and performed, they, the said Commissioners, parties to the said indenture, did demise, lease, and to farm let to the defendant all and singular the tolls to become payable by virtue of or under the authority of the said several Eaw Brink Acts, according to the schedule or statement of the said bills set forth in the said several Acts; and all other tolls in anywise payable to the said Commissioners under the same Acts; and also a certain tenement or toll-house, situate as in the said indenture particularly described: To have and to hold, receive, and take the tolls and toll-house thereinbefore demised, or intended so to be, with the appurtenances unto the defendant from the 1st of January then next ensuing, for the term of one year thence next ensuing, rendering and paying for the said demised premises to the treasurer for the time being of the said Commissioners the annual rent or sum of 3470*l.* during the said term, in manner following, that is to say, the sum of 289*l.* 3*s.* 4*d.* on the 1st of February then next ensuing, and the like sum of 289*l.* 3*s.* 4*d.* on the 1st day of every calendar month subsequent to the said month of February, in and during the said term of one year, without any deduction whatsoever, the last instalment or payment of the said rent being made on the 1st of January, A. D. 1851: And also rendering and paying to the treasurer for the time being of the said Commissioners the further rent or sum of 50*l.* in respect of the said demised premises for every month in which any portion of the rent should be in arrear for the space of twenty days next after the time hereinbefore appointed for payment

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thereof. And the defendant did thereby covenant &c. to and with the said Commissioners for the time being acting under the Acts, and their successors and assigns, as a separate covenant, by the said indenture, that he would on or at the days or times and in manner thereinbefore appointed, pay to the treasurer for the time being of the said Commissioners of navigation the said rent or sum of 3470*l.*, and also the additional and increased rent thereinbefore reserved, clear of all taxes, charges, deductions, or abatements whatsoever, according to the true intent and meaning of those presents. By virtue of which said demise, the defendant afterwards, to wit, on the 1st of January, A. D. 1850, to wit, entered into the said demised premises with the appurtenances, and became and was and remained so possessed thereof for the said term of one year, and during all that time had, took, and received the said tolls and all other benefits and advantages to be had under and by virtue of the said demise. Breach, the non-payment of the sum of 3470*l.*, and of the additional rent.

The second count was for money had and received by the defendant to the use of the said Commissioners, and on an account stated.

The defendant pleaded to the first count, that the indenture was not, nor was any part or counterpart thereof, signed, sealed, or delivered by the said five Commissioners as their deed, or in any other manner whatsoever, nor was the same, or any part or counterpart thereof, ever signed, sealed, and delivered by the said five Commissioners, or by any agent of theirs thereunto lawfully authorised &c.; nor was any lease of the premises in the declaration alleged to have been demised &c. unto the defendant for the term therein mentioned or any other term, or any lease of any part of the said premises put in writing under the hands and seals of the said five Commissioners, or made, signed, sealed, or delivered by them, or by any agent &c.; nor did the said Commissioners, or any five or more of

them, by any writing under their hands and seals, demise the said several navigation tolls, or any of them, to the defendant; and although, after the making of the said indenture, to wit, on the 1st of January, A.D. 1850, the said Commissioners did demise to the defendant the said premises, to have and to hold the same to the defendant as tenant thereof at the will of the said Commissioners; by virtue of which demise he entered into the said premises, and was possessed thereof under the last-mentioned demise until a certain day &c.; Yet the defendant never did, under or by virtue of the supposed demise in the said declaration mentioned, or under or by virtue of any demise by the said five Commissioners, save as herein aforesaid, enter into or become possessed of the said premises, with the appurtenances; and never did become, nor was he at any time, possessed thereof for any term whatsoever granted by the said indenture in the declaration mentioned, or otherwise than in this plea mentioned; and that there never was, except as aforesaid, any demise to the defendant.

Replication (in substance), that the defendant, under and by virtue of the said indenture and upon the terms thereof, by the consent and sufferance of the said Commissioners, entered into the possession and enjoyment of the said premises, so intended to be demised as in the declaration alleged, and had and enjoyed the same with the consent of the Commissioners for one whole year; and during that time the Commissioners consented and agreed to the said indenture, and suffered the defendant to remain in the possession and enjoyment of the same; and by virtue and on the terms of the indenture, and by such consent &c., all the said tolls in the indenture mentioned, and toll-house, with the appurtenances, and all other the benefit &c., as fully and effectually, to all intents and purposes whatsoever, had and enjoyed, as the defendant could have had and enjoyed if the said indenture had been executed

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by the said Commissioners or any five of them; and that during the said year the said tolls so had and received by the defendant amounted to a large sum; and the said toll-house was of great value, to wit, &c.

Special demurrer, and joinder therein.

The case was argued in the Sittings in last Term (June 8) by

Malcolm in support of the demurrer (a).—The defendant contends that the plea is a good answer to the first count of the declaration. First, these Commissioners are empowered by certain local Acts of Parliament to enter into engagements, and their clerk may sue for a breach of such contract. By the 1 & 2 Will. 4, c. lxxiii. s. 36 (b), five at least of the Commissioners must execute an instrument under seal. If they follow the statutory powers given them by the 35 Geo. 3, c. lxxvii. s. 104, and the 45 Geo. 3, c. lxxii. s. 58, they may sue by their clerk. It cannot be contended on their behalf, that they can successfully maintain an action upon the instrument declared on in the first count, inasmuch as it was not executed by the Commissioners as required by the Act in question.

Secondly. Upon the principles of the common law, the

(a) The objections raised by the special demurrer to the replication were abandoned by the defendant's counsel at the outset.

(b) That section, so far as it is material to the present question, enacts, that "it shall be lawful for the said Commissioners of Navigation, or any five or more of them, from time to time, by any writing or writings under their hands and seals, pursuant to orders for that purpose to be made as well by the said Commissioners of Navigation as also by the

said Commissioners of Drainage, at any of their respective general or quarterly meetings, to assign, demise, lease, or to farm let the said several navigation tolls, by the said recited Acts, or any of them, or by this Act imposed, &c., either from year to year, or for any term not exceeding three years, for such sum or sums, either annual or in gross, and upon such terms and conditions, and in such manner, as the said Commissioners, &c., shall think proper," &c.

plaintiffs cannot maintain an action upon a covenant to pay rent in consideration of an estate, where they have never demised that estate for which the rent is alleged to be due. A lessee might well covenant to pay a sum of 1000*l.* per annum for the enjoyment of an estate, on condition that he should enjoy it for the full term of a year; but he might be only induced to pay a much smaller sum, if liable to be ejected at any moment. These two descriptions of holding are essentially different. The covenant for the payment of the rent is dependent upon that which passes the estate for a given period. *Cooch v. Goodman* (a) does not conflict with this position. *Patteson, J.*, in speaking of that case in *Doe d. Marlow v. Wiggins* (b), says: "All that the Court decided there was, that the action might lie, although the deed was not executed by the covenantees; it was not held that an interest passed by the deed, or that it amounted to a lease. And the case went off upon another point." The principle upon which *Pitman v. Woodbury* (c) was rested by this Court, is expressly in the defendant's favour. *Parke, B.*, in delivering the judgment of the Court, says: "But with respect to leases by indenture, the older authorities shew that the covenants, which depend on the interest of the lease, and are made, because the covenantor has that interest—such as those to repair and pay rent during the term, are not obligatory, if the lessor does not execute,—not because the lessor is not a party, but because that interest has not been created to which such covenants are annexed, and during which only they operate, as such covenants undoubtedly do not if the term ends by surrender, and are suspended by eviction by the lessor, so they do not begin to operate unless the term commences: the foundation of the covenant failing, the covenant fails also." In that case, therefore, as in the present, the lessee covenanted to pay rent. The pleader

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(a) 2 Q. B. 580.

(b) 4 Q. B. 376.

(c) 3 Exch. 4.

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here calls it rent, and a toll house is also alleged to be demised in addition to the tolls. That covenant is dependent upon and runs with the estate, and if the estate does not pass, the covenant to pay rent is void: *Northcote v. Underhill* (a), *Waller v. Dean and Chapter of Norwich* (b), *Fursaker v. Robinson* (c). The plaintiff's remedy may perhaps be enforced under the count for money had and received, but an action of debt cannot be maintained upon the deed declared on in the first count.

J. Wilde, contra.—The authority of *Pitman v. Woodbury* is not impugned. The plaintiff, however, contends that the present case is distinguishable from that cited, in the two following respects:—First, this count discloses a lease of tolls. In *Pitman v. Woodbury*, the plaintiff relied upon a lease of land, containing also a covenant to repair; there is no doubt that such a covenant runs with the land during the continuance of the term; and the Court held, that if the lessee did not gain any interest in the term under that instrument, the covenant was void, and the lessor was not entitled to sue upon it. But this is a lease of tolls for one year, and the payments are to be made monthly. It is not a covenant to pay rent, according to the legal meaning of that term; it has rather the character of a license to take the tolls during the period agreed upon. Many of the characteristics of rent are not to be found in tolls. The true character of rent appears from Sheppard's "Touchstone," chap. 5, p. 80, "Exposition of Deeds." The defendant contracted to pay not a rent but a sum in gross, which is not connected with land, so as to make the defendant's covenant dependent.

Secondly, *Pitman v. Woodbury* was an action of covenant, and the plea expressly stated that the defendant had never entered; but here the replication alleges that the

(a) 1 Salk. 199. (b) Owen, 136; 2 Brownlow, 158. (c) Chan. Prec. 475.

defendant has fully enjoyed the consideration for his covenant. The defendant might have called upon the Commissioners to execute the deed at any time during the continuance of the term. Enough appears upon the face of this record to entitle the plaintiff to maintain an action of *debt*, founded upon the deed: *Rose v. Poulton* (a), *Attos v. Hemmings* (b).

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Malcolm, in reply, cited *Wilson v. Woolfryes* (c).

Cur. adv. vult.

The judgment of the Court was now delivered by

MARTIN, B.—This was a demurrer to a replication to a plea to the first count of the declaration. The count was in debt upon an indenture, dated the 27th of December, 1849, alleged to have been made between five Commissioners of an inland navigation, under the authority of several Acts of Parliament, on the one part, and the defendant on the other part, whereby the Commissioners, as was alleged in the declaration, in consideration of the rent therein mentioned, demised the tolls of the said navigation to the defendant for one year from the 1st of January, 1850, at the rent of 3470*l.*, payable monthly, together with some other payments; and the defendant covenanted with the Commissioners, parties to the said indenture, and also with the whole body of the Commissioners of the navigation, as a separate covenant, for the due payment of the rent. The declaration then averred an entry by virtue of the demise, and the occupying and receiving the tolls during the entire year, and concluded in the usual way, alleging the non-payment of the rent.

To this the defendant pleaded, that the Commissioners, the lessors named in the indenture, never executed the

(a) 2 B. & Ad. 322. (b) Bulst., Pt. 2, p. 281. (c) 6 M. & Selw. 341.

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lease, and that the entry and occupation was at the will of the Commissioners only, and not under the demise. There was an immaterial replication to the plea, and a demurrer to the replication.

The only question argued before us was, whether the judgment of this Court, in *Pitman v. Woodbury*(a), governed the present case. It was argued, on behalf of the plaintiff, that the principle of that case only applied to rent properly so called; that, in the present case, there was really no rent at all, but merely a sum in gross, covenanted to be paid, and which was recoverable under the covenant, either by the body of the Commissioners at large, or by the five Commissioners, the parties to the indenture; and that, inasmuch as the defendant actually enjoyed the tolls in precisely the same manner as if the lease had been executed, he was liable upon the covenant to pay the stipulated compensation, it being a sum in gross. There is no doubt that this was not rent properly so called. Rent can only issue out of a corporeal hereditament, which tolls are not. But we nevertheless think that the principle of the judgment in *Pitman v. Woodbury* applies. That which the defendant stipulated for, and for which he was to pay the sum of money mentioned in the indenture and in the first count of the declaration, and in both designated as rent, was an estate in the tolls for one year, or a legal right to enjoy an incorporeal hereditament for a year. The payment was to be made by him in consideration of his having such an estate of right, which would, if the lessors had executed the indenture, have been an estate permanent and continuing of right during the term of the demise. It is true, he had and enjoyed the tolls during the whole term, but he had them under a different right altogether from that stipulated for by the indenture. In reality he occupied and enjoyed them under a license

(a) 3 Exch. 4.

revocable at any moment. He therefore never had the consideration, nor did he enjoy the interest for which he contracted to make the payment. We therefore think, that the principle of *Pitman v. Woodbury* applies; and that the true consideration for the payment stipulated in the indenture, viz. a certain estate or right in the tolls for one year, never arose, and is a consideration which has wholly failed. The liability of the defendant must, in our judgment, be enforced in a form of action different from that founded upon an actual demise by indenture, and an entry and enjoyment under it, which is the form of claim set up in the first count, and which, in reality, never took place or existed at all. The judgment will be for the defendant.

Judgment for the defendant.

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DOE *d.* SUSANNAH MARY JOHNSON *v.* EDWARD HAMMOND
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EJECTMENT to recover possession of certain freehold lands, situate in the parish of Great Coggeshall, in Essex. After issue joined, by consent, and by an order of a learned Judge, the following case was stated for the opinion of this Court:—

William Johnson, late of Great Coggeshall, in the county of Essex, being at the time of making his will hereinafter mentioned, and thenceforth to and at the time of his decease, seised in fee of certain freehold messuages, lands, and hereditaments, situate in Great Coggeshall, and being entitled in fee simple to certain copyhold messuages, lands, and hereditaments, situate at Feering, in the county

A testator by his will (made A.D. 1826) devised as follows:—"I give and devise unto my wife Elizabeth the lands, &c. to hold the same unto her and her assigns for and during her natural life, and, after her decease, I give and devise the same to my nephew S. J., his heirs and assigns, for ever; provided al-

ways and my will is, that in case it should happen that my said nephew shall depart this life before he shall have attained the age of twenty-one years, and if after he shall have attained such age of twenty-one years he shall die unmarried, or having been married without lawful issue, then I give the same unto my brothers T. J. and J. J. &c., and their heirs, for ever, as tenants in common."—*Held*, that the testator's nephew S. J. did not take an estate tail, but an estate in fee simple, in the lands, with an executory devise over to the testator's brothers in the event of S. J. dying under twenty-one, or after that age dying without leaving lawful issue at the time of his death.

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aforesaid, mentioned in his will, by his last will and testament in writing, dated the 28th of December, A. D. 1826, duly executed and attested, gave and devised as follows:—
“I give and devise unto my dear wife Elizabeth Johnson all and singular my freehold and copyhold estate, situate, lying, and being in the parishes of Great Coggeshall aforesaid, and Feering, in the said county of Essex, to hold the same unto my said dear wife Elizabeth and her assigns, for and during the term of her natural life, she keeping the same in good and tenantable repair. And from and after her decease, I do give and devise the same unto my nephew, Samuel Johnson, who now resides with me, his heirs and assigns, for ever. Provided always and my will is, that in case it should happen that my said nephew, Samuel Johnson, shall depart this life before he shall have attained the age of twenty-one years, and if after he shall have attained such age of twenty-one years shall die unmarried, or having been married without lawful issue, then I do give and devise the same in manner following, that is to say:—I do give and devise unto my brother, Edward Hammond Johnson, and his heirs, all that my copyhold farm and estate, called Root’s Farm, situate in the said parish of Feering, in the said county of Essex, to hold the same unto my said brother Edward Hammond Johnson, his heirs and assigns, for ever. And I do give and devise my said estates in Great Coggeshall aforesaid unto my brothers Thomas Johnson, Joseph Johnson, Edward Johnson, and James Johnson, and their heirs, to hold the same unto the said Thomas Johnson, Joseph Johnson, Edward Johnson, and James Johnson, their heirs and assigns, for ever, as tenants in common, and not as joint tenants.”

The said testator died A. D. 1827, without having revoked or altered his said will, and the same was duly proved.

The testator’s wife Elizabeth Johnson, and his nephew Samuel Johnson, both survived him, and the said Samuel

Johnson attained the age of twenty-one years on the 21st day of April, 1834, in the lifetime of the said testator's said widow.

On the 27th of September, 1836, the said Samuel Johnson married one Susannah Farrington, and had issue by her a son and a daughter, twins, born on the 8th of December, 1837; one of such children, the daughter, being the said Susannah Mary Johnson, the lessor of the plaintiff; and the other of such children, the son, was named Edward, who survived the said Samuel Johnson, and died as hereinafter stated.

In 1838, after such marriage and the birth of such children, and during the lifetime of the testator's said widow, and by a certain indenture of release bearing date the 23rd July, 1838, grounded on a lease for a year dated the preceding day, the said indenture of release being made between the said Samuel Johnson of the first part; Bartholomew Brown, Abraham Barnard (the executor who proved the will), and the defendant Edward Hammond Johnson, who survived the said Bartholomew Brown and Abraham Barnard, as hereinafter mentioned, of the second part; and the several other persons whose names and seals were thereunto subscribed and affixed, being respectively creditors of the said Samuel Johnson, of the third part; and which said indentures of lease and release were duly executed by the said Samuel Johnson; he the said Samuel Johnson granted, released, and conveyed unto the said B. Brown, A. Barnard, and E. H. Johnson, and to their heirs, all the freehold messuages &c. devised to the said S. Johnson in and by the said will of the said William Johnson, to hold the same unto and to the use of the said B. Brown, A. Barnard, and E. H. Johnson, their heirs and assigns, for ever, upon the trusts thereafter expressed and declared concerning the same. And the said S. Johnson did by the same indenture covenant to surrender to the use of the same parties, their heirs and assigns, the copyhold he-

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reditaments devised to him by the said will, to be held upon like trusts; and the trusts declared by the said indenture were in substance these, viz.:—That in case the said Samuel Johnson, his heirs, executors, administrators, or assigns, should pay to his several creditors mentioned and referred to in the said indenture the full amount of their respective debts in the said indenture also referred to, within six calendar months next after the decease of the said Elizabeth Johnson, together with interest upon the amount of the said respective debts until payment thereof, then the said B. Brown, A. Barnard, and E. H. Johnson, or their survivor, or the heirs or assigns of such survivor, would re-convey unto the said Samuel Johnson, his heirs or assigns, the hereditaments by the said indenture released and conveyed, and that the surrender to be made according to his said covenant of the said copyhold hereditaments should be void; but in case the said Samuel Johnson, his heirs, executors, administrators, or assigns, should make default in payment of the said several debts or any of them, then the said B. Brown, A. Barnard, and E. H. Johnson, or the survivor, or the heirs or assigns of such survivor, should sell and dispose of all the said freehold and copyhold hereditaments and premises, and apply the clear proceeds of such sale in payment of the said debts and otherwise as in the said indenture is mentioned.

The said Samuel Johnson died in or about October, A. D. 1848, intestate, in the lifetime of the said Elizabeth Johnson, the widow and tenant for life, leaving the said Edward Johnson his only son and heir-at-law, and his said daughter the lessor of the plaintiff Susannah Mary Johnson, surviving him.

The said Edward Johnson died in the month of April, 1849 (in the lifetime of Elizabeth Johnson), an infant of the age of twelve years, leaving his sister the lessor of the plaintiff Johnson, his heiress-at-law, surviving him.

Elizabeth Johnson, the widow, died in February, A. D. 1850.

The debts of the said Samuel Johnson due to his creditors, parties to the said indenture of the 23rd July, 1838, were not paid in full within six months after the death of the said Elizabeth Johnson.

The said B. Brown and A. Barnard both died, leaving the defendant Edward Hammond Johnson them surviving.

The property, in respect of which this action was brought, was part of the freehold property of which the testator died seised, and which was devised by his will; and the defendant E. H. Johnson, having survived the said B. Brown and A. Barnard as aforesaid, claimed to be absolutely entitled thereto in fee simple, by virtue of the conveyance made or expressed to be made by the said indentures of lease and release.

The said Susannah Mary Johnson, the lessor of the plaintiff, claims that, upon the death of the said Elizabeth Johnson, she became and was entitled as tenant in tail to the said lands &c. under the will of the said William Johnson the testator, as the only child of the said Samuel Johnson deceased, free from the trusts of the said indenture of the 23rd of July, A. D. 1838, which is contended by her to be inoperative in the events which had happened.

The question for the opinion of the Court is, whether under the preceding circumstances the lessor of the plaintiff, upon the death of the said Elizabeth Johnson, became entitled to the property in question for an estate tail.

If the Court shall be of opinion that the lessor of the plaintiff became so entitled, judgment is to be entered for the plaintiff; but if the Court shall be of a contrary opinion, judgment of non pros. is to be entered.

The case was argued last Term (June 8) by

Watters for the lessor of the plaintiff. — Under this devise, Samuel Johnson took an estate tail in remainder expectant on the death of the testator's widow, with remainder to the testator's brothers in fee, subject to an executory

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devise over to the brothers, by way of acceleration of the remainder in fee in the event of the devisee's death under the age of twenty-one, either with or without issue. If this be not so, he took originally an estate in fee in remainder expectant on the death of the testator's widow, with an executory devise over to the brothers in fee in the event of the devisee's death under twenty-one, with an alternative executory devise over in the event of his attaining twenty-one to himself in tail, with remainders over to the brothers in fee.

The question turns upon the meaning of the words "or without lawful issue;" that is, whether they import an indefinite failure of issue, or a failure of issue at the death of the devisee. It is a well-established rule of law, that the restriction of words importing a failure of issue to a failure of issue at the death of a devisee of real estate, can only be effected by shewing either that such was clearly the testator's intention, or that such an intention may be gathered from the language of the instrument. That is not so here: the fact of his directing the property to go over in the event of the death of the devisee unmarried, of itself is insufficient, as his death as a bachelor is one of the events in which an estate tail would naturally be determined, and is therefore consistent with the general rule. The same reasoning applies to the event of the devisee dying under twenty-one, for in that case it was not intended that his issue, if he had any, should inherit. It is clear that provisions made for events in which either the devisee never could have issue, or in which it was not intended that his issue should take, do not throw any light upon the testator's intention to provide for the event of the devisee attaining twenty-one and having issue, by shewing what parties were intended to take the benefit of the gift to the parent. Now there ought to be some evidence that it was the testator's intention that, in case the devisee attained twenty-one and had issue, the estate was

only to go over on failure of such issue in his lifetime. Each of the decisions bearing upon this point contains some fact connected with the mode in which the gift over was made, to shew that such gift was necessarily intended at all events to take effect at the death of the devisee. Here that essential element is absent. The main difficulty here arises from the limitation over in the event of the devisee dying under twenty-one. That being coupled with a previous devise to him, "his heirs and assigns," gives the limitation the appearance of a fee, with an executory devise over. But the gift over in the event of the devisee dying under twenty-one, is consistent either with an estate tail, or an estate in fee in him. To determine, therefore, whether he originally took in tail or in fee, this provision should be disregarded, and should be treated as a proviso attaching upon the gift. The construction of a will cannot be made to depend upon the mere collocation of the words. The language may be transposed, if the meaning remains unaltered. This devise may be treated as if it stood as a devise to S. Johnson, his heirs and assigns, "provided that if the said S. J. shall die unmarried, or having married without issue, to the brothers in fee, provided that if S. J. shall die under twenty-one, under any circumstances, to go to the brothers in fee," which would be a clear estate tail, with an executory devise over by way of acceleration of the remainders. The testator inserted the provision as to the devisee's death under twenty-one, to avoid the repetition of the limitation over to the brothers. There is no reason against such a construction as this. Executory devises defeating estates tail are of frequent occurrence in strict settlements. In *Lord Scarborough v. Doe d. Savile (a)*, it was held, that such executory devises accelerated the remainders, and did not create new estates. Whether the devise over is upon one event or another, whether on the acqui-

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(a) 3 A. & E. 897.

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sition of other estates, or on a death under twenty-one, is not material. *Glover v. Monckton*(a) will be relied upon by the defendant. No reasons for the opinion of the Court were given there; but it appears from the report of the arguments, that the construction in question was rested first upon *Roe v. Jeffery*(b), there being an estate for life to the testator's daughter, limited on failure of issue of the son, which, it was argued, pointed to a failure of issue at the death; and, secondly, on the ground that there was an event in which, under any circumstances, the testator's son must have retained the fee—namely, his death under twenty-one, having survived his sister, and consequently that the devise over on failure of issue must have operated as an executory devise. But *Roe v. Jeffery* does not of itself support the decision, since the doctrine there acted upon applies only where a life estate is limited over. On this point, what was said by Sir W. Grant in *Barlow v. Salter*(c), and the case of *Doe d. Jones v. Owens*(d), may be referred to. The second ground upon which the case was rested does not apply here, as there is no event in which S. Johnson could have retained the absolute fee. It is to be observed, that the decision in *Glover v. Monckton* appears unsound, as being directly opposed to the rule which refers words imputing failure of issue to an indefinite failure of issue. If, however, the devisee there originally took in fee, he might well have been held to take in tail on attaining twenty-one, as there was clearly a gift over in case of his attaining twenty-one, and afterwards dying without issue. A testator may, if he chooses, give an estate in fee in the first instance, and afterwards divest it in favour of an estate tail to the same party, with remainders over. The corresponding result is to be met with in all marriage settlements, where the settlor takes a fee until marriage, with a minor estate arising by way of shifting use after

(a) 3 Bing. 13.

(b) 7 T. R. 589.

(c) 17 Ves. 483.

(d) 1 B. & Adol. 318.

the marriage. And there is nothing in *Glover v. Monckton* to shew that the testator meant the gift over necessarily to take effect on the death of the devisee. The construction, which refers a failure of issue to issue at the death, although it has been sanctioned by the legislature in the late Statute of Wills, is by no means a convenient construction. A testator's object in devising the estate over, in case the devisee by implication dies without issue, is to give the enjoyment of the estate to issue, if there be any, intending thereby to benefit both the issue and the parent. If there be no issue, the parties taking under the gift over are then to enjoy the testator's bounty. This intention is defeated by the opposite construction. Upon that supposition, if the issue were to survive their parent but for a short time, the title of the parties claiming under the gift over would be defeated, and the estate of the first devisee, though there were no issue within a day after his death, would be rendered indefeasible. It is difficult to see why the title of the devisee over should depend on the mere accident of the survivorship of the issue, although but for a short time; and, moreover, the interests of the issue would be sacrificed by being subjected to the parent's right of alienation. A defeasible fee is a most objectionable form of limitation, as it confers an absolute power of alienation as against the devisee and those claiming under him, without the certainty of enjoyment; and the devisee cannot, except upon a contingency, dispose of the estate by sale. In the event of the bankruptcy or insolvency of the devisee, the estate would be forced into the market to the disadvantage of himself and of his issue, to the advantage alone of some successful speculator. Such a disposition of the estate would never be made by a prudent testator. It must, however, be admitted, that, upon the construction now contended for, the devisee, as tenant in tail, would have a

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power of alienating; but, as his ownership for the purposes of alienation would be absolute, he might sell upon the best terms. But even if an alienation had been effected, this matter could not affect the question.

Fooks contra.—The testator's nephew took an estate in fee simple in the property in question under the will, with an executory devise over in the event of his decease under the age of twenty-one, or of his dying after that age without leaving lawful issue at the time of his death. The proposition that the testator's intention to give the fee must appear by the will, is not disputed. And here the testator gives in the first instance the fee to the nephew, by the words "to him and to his heirs for ever;" and it therefore is incumbent upon the party, who contends that a less estate than a fee is created by the will, to shew that the estate so created by the first passage in the will is cut down by what follows. The words "or without lawful issue" point to the death of the first devisee, and import a failure of issue at that moment. Now the gift over in the case of a failure of issue is associated with other events, which are clearly ascertainable at the death of the devisee, namely, to his dying under the age of twenty-one, or having attained that age to his dying unmarried. The simplest and most natural interpretation of the will is in favour of the same construction applying to the death without issue. The testator has in fact pointed to the death of his nephew in every event, but under different circumstances. This view of the meaning of the will removes the difficulty raised by the plaintiff's construction, according to which the devisee would take an estate in fee simple in one event, and an estate tail only in another. Such a construction as that is apparently inconsistent with the testator's intention. The authorities are also in favour of the defendant. This subject is treated of in 2 Jarman on Wills, 428; and in speaking

of the principle of the decision in *Glover v. Monckton*, it is there said, that "The same principle probably would be considered as extending to every case in which a dying without issue is combined with an event personal to the individual, as the event of his dying without issue and unmarried, or without leaving a husband or wife (which is the meaning of 'unmarried' in this situation)." The leading case upon this point is that of *Roe v. Jeffery* (a), where Lord *Kenyon*, C.J., says: "The question, therefore, in this and similar cases, is, whether, from the whole context of the will, we can collect, that when an estate is given to A. and his heirs for ever, but if he die without issue then over, the testator meant *dying without issue at the death of the first taker*. The rule was settled so long ago as in the reign of James the First, in the case of *Pells v. Brown* (b), where the devise being to Thomas, the second son of the devisor, and his heirs for ever, and if he died without issue living William his brother, then William should have those lands to him and his heirs for ever; the limitation over was a good executory devise." In *Eastman v. Baker* (c), the words of the will were: "I give and devise to my daughter all my right, title, and property in a certain messuage, called &c., from and immediately after my decease, without impeachment, to her and her heirs, for ever and ever. But if she shall die without issue, or not having attained the age of twenty-one years, then I give the same to my dear wife in manner and form aforesaid," with this proviso, "that if in case my said daughter shall survive my wife, then I give all my said lands to my said daughter for ever and ever, without impeachment;" and it was held, that the testator intended to give the daughter the fee. So, in *Doe d. Smith v. Webber* (d), the testator bequeathed real and personal estate to his niece H., her heirs, execu-

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(a) 7 T. R. 589.
 (b) Cro. Jac. 590.

(c) 1 Taunt. 174.
 (d) 1 B. & Ald. 713.

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tors, administrators, and assigns, for ever, provided, that in case she should happen to die, and leave no child or children, then he devised to his niece B. his freehold lands called W., to her and her heirs for ever, paying 1000*l.* unto the executor or executors of his said niece H., or to such person as she by her last will and testament should direct: and it was held that H. took an estate in fee, subject to an executory devise on her leaving no issue *at her death*. These two cases are precisely similar to the present. In *Doe d. King v. Frost* (a) the testator devised to his son W. and his heirs certain real estate, provided, that if his son W. should have no issue, the estate was, on his decease, to become the property of the heir-at-law, subject to such legacies as W. might leave by will to any of the younger branches of the family; and it was there held, that W. took an estate in fee, with an executory devise over in the event of his dying leaving no issue at his death, to such person as should be then and in that event heir-at-law. In the recent case of *Ex parte Davies* (b), a testator devised his residuary real and personal estate to his eldest son, and his heirs &c.; provided that in case his said son *should die without leaving any lawful issue of his body*, such part of his said residuary estate as was freehold, and situate in certain places, should, *at his death*, be divided into two equal parts, one of which he gave to his second son and his heirs, and the other to his daughter and her heirs: Lord *Cranworth*, V. C., held, that the eldest son took an estate in fee simple in the residuary freehold estate, and situate at the places named, with an executory devise over to take effect at his death in case he should have no issue then living. The words "there at his death" do not materially differ that case from the present. The testator here clearly intended to give his nephew an estate in fee, with an executory devise over, in case any of the events

(a) 3 B. & Ald. 546.

(b) 2 Sim., N. S., 114.

specified in the will should occur; and the authorities are uniformly in favour of this construction.

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Watters, in reply.—The gift over being made to depend on some events necessarily ascertainable at the death of the devisee, does not require that other events should be referred to that precise period, where such other events are not of necessity so ascertainable. Where a testator expressly gives a life estate to the devisee, with remainder to his children in fee, with a subsequent gift over in case the devisee dies without leaving issue, the words refer to an indefinite failure of issue; though the effect of such construction be to cut down the estate in fee to the children to an estate tail, and to raise a further estate tail by implication in the parent: *Doe d. Todd v. Deubury*(a). In all the cases cited from Jarman on Wills, the period of the death was to take place under a particular age. *Roe v. Jeffery* proceeded on the ground of the gift over being a life estate; and *Doe v. Frost* and *Ex parte Davies* on the ground of the gift being expressly framed to take effect on the decease of the prior devisee. In *Doe v. Webber*, the estate was charged with the payment of a legacy by the devisee over, and this was treated as evidence of an intention to refer the failure of issue to the death of the first devisee.

Cur. adv. vult.

The judgment of the Court was now delivered by

MARTIN, B.—This was an action of ejectment to recover the possession of certain lands in the parish of Great Coggeshall, in the county of Essex, and in which action, by the consent of the parties and the order of a Judge, a case was stated for the opinion of the Court.

The question is, whether the lessor of the plaintiff, Susannah Mary Johnson, was entitled to the lands above

(a) 8 M. & W. 514.

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mentioned, by virtue of a devise in the will of her grandfather, William Johnson, dated the 28th December, 1826. If her father, Samuel Johnson, took an estate in fee by virtue of this devise, she is not entitled; but if he took an estate tail, she is.

William Johnson, the deviser, being seised in fee of the lands, devised in substance as follows:—"I give and devise unto my wife Elizabeth the lands, &c., to hold the same unto her and her assigns for and during her natural life; and, after her decease, I give and devise the same unto my nephew, Samuel Johnson, his heirs and assigns, for ever; provided always, and my will is, that in case it should happen that my said nephew shall depart this life before he shall have attained the age of twenty-one, or after he shall have attained such age of twenty-one shall die unmarried, or having been married shall die without lawful issue, then I give and devise the same to my brothers, Thomas Johnson and Joseph Johnson, &c., and their heirs, for ever, as tenants in common."

The nephew, Samuel Johnson, attained twenty-one, and conveyed away the land, assuming to be tenant in fee simple thereof. He died, leaving two children, a son and a daughter (the lessor of the plaintiff), surviving him. The son died an infant in the lifetime of Elizabeth Johnson, the tenant for life; and on her death the daughter brought the present ejectment, insisting that, by the devise above set out, an estate tail was created in her father, Samuel Johnson; and that this estate not being barred by the conveyance executed by him, she was entitled to recover possession of the lands in question.

The case was fully argued before us, and we are of opinion that Samuel Johnson did not take an estate tail, but took an estate in fee simple, with an executory devise over in the event of his dying under twenty-one, or, after that age, dying without leaving issue living at the time of his death.

The estate expressly devised to him was an estate in fee simple "to him and his heirs for ever." Then there came a proviso, first, if he should die under twenty-one; secondly, if he should die after twenty-one unmarried; thirdly, if he should die, having been married, without lawful issue. Now the first two of these events directly point to the period of his death; and we think it would be a very forced construction of the devise to hold that the third event pointed not to his death without leaving issue then living, but to the failure of issue of his body at any period, however remote; which is the construction contended for on behalf of the lessor of the plaintiff. The same words, "shall die," are in the devise directed to both events, viz. "being unmarried," and "without lawful issue;" and we think that it was the state of things existing at the time of Samuel's death, which was to determine whether the future estate to the uncles, Thomas Johnson and Joseph Johnson, should come into enjoyment or not. Indeed, the estates which it was contended by the learned counsel for the lessor of the plaintiff were created by the will, were of such a shifting character, namely, an estate in fee to Samuel Johnson, with an executory devise to his uncles in the event of his dying under twenty-one, but upon his attaining twenty-one an estate tail to him, with legal remainder over to his uncles, that, we think, very plain and express words would be necessary to create such estates.

If the case stood alone, without authority, we should have been of opinion that Samuel Johnson took an estate in fee simple, with an executory devise over; but the case of *Glover v. Monckton* (a) seems to us expressly in point. There was there a devise of real and personal estates, in the first instance, for the benefit of the son and daughter of the testator until they attained twenty-one, or the daughter married, and then to raise 5000*l.* for her, and then to his

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(a) 3 Bing. 13.

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son, his heirs, executors, administrators, and assigns, for ever, according to the respective nature of the estates; but as to his real estate, in case his son should not live to attain twenty-one, and his daughter should be living at his decease, or in case his son should live to attain such age, and should afterwards die without lawful issue, then to his daughter for life, &c. The Court of Common Pleas certified to the Master of the Rolls, that, in their opinion, the son took an estate in fee in the real estate, with an executory devise over in the event of his dying without issue living at his death. This case seems to us directly in point, and confirms our view as to the true construction of the devise in the present case.

None of the other cases cited by the learned counsel for the lessor of the plaintiff appear to us to be at all at variance with the judgment of the Court of Common Pleas in *Glover v. Monckton*. We, therefore, in pursuance of the power given to us, direct a judgment of non pros. to be recorded.

Judgment of non pros.

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THE PRUDENTIAL MUTUAL ASSURANCE INVESTMENT AND
LOAN ASSOCIATION v. CURZON.

June 26.

DEBT on a bond, by which the defendant and John Leigh Spencer and Francis Lloyd bound themselves to the plaintiffs (a Joint-stock Company duly registered) in the penal sum of 600*l.*—Plea, non est factum.

By a bond, A., B., and C. bound themselves, in the penal sum of 600*l.*, to a Joint Stock Company. This bond, after reciting that A. and B. had agreed to join with C., as his sureties, subject to the

The plaintiffs suggested as breaches under the statute, first, the nonpayment of the second and third instalments of 100*l.* each, with interest; and secondly, the sum of 23*l.* 14*s.* 7*d.* for one premium on the life of Mr. Spencer,

conditions thereafter contained, in consideration of the Company then advancing C. the sum of 300*l.*, contained the following conditions: that if any of the said bounden parties should pay to the Company the principal sum of 300*l.*, by three equal yearly payments of 100*l.* each (on specified days), or so much of the said payments as should be owing on the day of the decease of C., which should first happen, and should in the meantime, until the principal sum should so become due, and until it should be all paid, pay the Company interest at the rate of 5*l.* per cent. upon the said principal sum of 300*l.*, in equal half-yearly payments (on specified days), and that they also should in the meantime and until the principal sum of 300*l.* should become due, and until the same, with interest, should be fully paid, well and truly pay the annual premiums which should, during the continuance of the loan, become payable on a certain policy of assurance, under the hands of three of the directors of the Company, whereby the funds of the Company were, on payment by C. or his assigns during his life of the annual premium of 23*l.* 14*s.* 7*d.*, made liable to pay C.'s executors, &c., after his decease, the sum of 499*l.* 10*s.*; which instrument had then been deposited as a collateral security for the payment of the principal sum of 300*l.* and interest thereon, and of the premiums which might be due and unpaid, provided the Company might consider the policy as subsisting, notwithstanding any premium might not be paid; and if C. should not, during the continuance of the said loan, do any act by which the policy might be avoided, and in case either A. or B. should during such time die or go abroad, and if within a time therein mentioned either of them should obtain and substitute a new surety in the place of such surety so dying, &c., who should enter into a like bond, or in case A. or B. should give such additional security for the said principal sum, or so much as should then remain unpaid, and the interest thereof, or should forthwith pay upon demand the principal sum and interest, or so much as should be due, then the said bond was to be void, otherwise it was to remain in full force, provided that in case any of the events mentioned in the conditions indorsed on the policy should happen during the deposit of the policy, it should be considered as wholly void; and lastly, that if default should be made in payment of the interest, or of either of the instalments, or of the premiums, according to the said stipulations, the whole of the principal should thereupon become payable.

Held, per *Pollock*, C. B., *Alderson*, B., and *Platt*, B., that the bond secured the payment of the principal sum of 300*l.*, with interest only; and that the bond was rightly stamped with a 3*l.* stamp, which covered the principal sum. Per *Parke*, B., that the bond secured the payment of the premiums also.

Held, per totam curiam, that documents stamped with a "denoting" stamp by the Commissioners, under the 13 & 14 Vict. c. 97, s. 14, cannot be objected to, when tendered in evidence, as being improperly stamped.

Held, also, that where in an action on a bond the instrument is objected to at the trial as being insufficiently stamped, and afterwards, but before the case is argued in banc, a denoting stamp is affixed to it by the Commissioners, such objection to the sufficiency of the first stamp is not thereby removed.

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which had become due on the 4th of October, 1851, according to the condition of the bond.

At the trial, before *Parke*, B., at the Sittings for Middlesex in the last Term, the plaintiffs, in support of their case, offered in evidence a bond stamped with a 3*l*. stamp. This bond, after reciting that the said F. Curzon and F. Lloyd had agreed to join with the said J. L. Spencer in the bond, subject to the conditions thereunder written, as sureties for the said J. L. Spencer, his heirs, &c., in consideration of the said Association advancing to the said J. L. Spencer the sum of 300*l*., proceeded as follows:—"Now, therefore, the condition of the above-written bond or obligation is such, that, if the said J. L. Spencer, F. Curzon, and F. Lloyd, or any or either of them, their or any of their heirs, executors, or administrators, shall well and truly pay or cause to be paid to the said Prudential &c. Association, their successors or assigns, at the office for the time being of the said Association, in London or Westminster, the principal sum of 300*l*. of lawful money, &c., which has been this day lent and advanced by the said Association to the said J. L. Spencer, out of the funds of the said Association, by three equal yearly payments of 100*l*. each, on the 12th day of October in the year 1850, the 12th of October in the year 1851, and the 12th of October in the year 1852 respectively, or so much of the said payments as shall be owing on the day of the decease of the said J. L. Spencer, which shall first happen, and also shall, in the meantime and until the said principal sum of 300*l*. shall become due as aforesaid, and until the same and every part thereof shall be fully paid, well and truly pay or cause to be paid unto the said Association, their successors or assigns, interest, after the rate of 5*l*. for every 100*l*. by the year, for the said principal sum of 300*l*., or so much thereof as shall from time to time remain due and unpaid, to be computed from the day of the date

hereof, by equal half-yearly payments, payable in advance, on the 12th of April and the 12th of October in each year, the first of such half-yearly payments to be made on the date and execution hereof, and also shall, in the meantime and until the said principal sum of 300*l.* shall become due, and until the same and every part thereof, and the interest which shall become due thereupon shall be fully paid in manner aforesaid, well and truly pay the annual premiums respectively, which shall, during the continuance of the said loan, become payable on a certain instrument or policy of assurance, under the hands of three of the directors of the said Association, bearing date the 4th day of October, 1849, and numbered &c., whereby the capital stock and funds of the said Association are, on payment by the said J. L. Spencer or his assigns during his life of the annual premium of 23*l.* 14*s.* 7*d.*, made liable to pay to the executors, administrators, or assigns of the said J. L. Spencer, within three calendar months after satisfactory proof of his decease, the sum of 499*l.* 10*s.*, which instrument or policy of assurance has been this day deposited with the said Association as a collateral security for the payment of the said principal sum of 300*l.* and interest as aforesaid, together with interest at the rate aforesaid on the amount of each premium or premiums from the time or respective times when the same ought to have been paid for keeping the said policy on foot, provided the said Association, their successors or assigns, shall choose to regard and treat the said policy as subsisting, notwithstanding any premium or premiums payable in respect thereof shall not have been duly paid. And if the said J. L. Spencer shall not, during the continuance of the said loan, do any act or go to any place, by doing or going to which respectively the said policy may be avoided, and in case the said F. Curzon and F. Lloyd, or either of them, or any new surety or sureties to be substituted as herein-

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after mentioned, shall, during the time that the said principal sum of 300*l.* and interest, or any part thereof, shall remain unpaid, die, or go to reside beyond the seas, then and in such case, as often as the same shall happen, if the said J. L. Spencer, F. Curzon, and F. Lloyd, or any or either of them, shall and will, within twenty-one days next after the happening of such respective events, find and substitute some other responsible surety or sureties, to be approved by the said Association, their successors or assigns, in the place or stead of the surety or sureties so dying or going to reside beyond the seas as aforesaid; and if such new surety or sureties shall thereupon respectively, at the costs and charges of the said J. L. Spencer, F. Curzon, and F. Lloyd, or any or either of them, enter into a bond or obligation of the same tenor or effect as in these presents contained; or in case the said J. L. Spencer, F. Curzon, and F. Lloyd, or any or either of them, shall either give, at their or his own expense, such additional security for the said principal sum, or so much thereof as shall then remain unpaid, and the interest thereof, as shall be approved by the said Association, their successors or assigns, or, at the option of the said Association, their successors or assigns, pay forthwith upon demand the said principal sum and interest, or so much thereof as shall be then unpaid, then this present obligation shall be void, otherwise shall be and remain in full force and virtue: Provided always, that in case any of the events mentioned in the conditions indorsed on the policy which has been so deposited as aforesaid shall happen during the continuance of such deposit, the said policy shall thereupon become or be considered as wholly void, not only as regards the executors or administrators of the said J. L. Spencer, but as to all other persons whomsoever, notwithstanding anything in the said conditions contained to the contrary. And lastly, that if default be made in payment of the in-

terest, or of either of the said instalments, or of the premiums, according to the stipulations aforesaid, then the whole of the said principal shall thereupon become payable."

It was thereupon objected, on the part of the defendant, that, the premiums of insurance being reserved for the term of Spencer's life, the stamp-duty applicable in respect of a bond "given as a security for payment of any sum or sums of money, at stated periods, for the term of life," ought to have been affixed to the bond, in addition to the stamp duty applicable in respect of the principal amount advanced, and, consequently, that the bond offered in evidence was not properly stamped. The learned Judge nonsuited the plaintiffs, with leave to them to move to set that nonsuit aside, and to enter a verdict for the sum of 229*l.* 14*s.* 7*d.*, and 1*s.* damages.

In the present Term, *J. Brown* obtained a rule nisi accordingly. After the trial, the plaintiffs had sent the bond in question to the Stamp-office, and the Commissioners had affixed to the bond a "denoting" stamp, under the 14th section of the 13 & 14 Vict. c. 97.

Spinks shewed cause.—The stamp affixed to the bond, when produced at the trial, was insufficient under the schedule to the 55 Geo. 3, c. 184 (a). The bond here is so fram-

(a) The schedule of the 55 Geo. 3, c. 184, so far as is material to the present question, is as follows:—"Bond in England given as a security for the payment of any definite and certain sum of money, exceeding 200*l.*, and not exceeding 300*l.*—3*l.*"

"Bond in England given as a security for the payment of any

annuity (except upon the original creation and sale thereof), or of any sum or sums of money at stated periods (not being interest for any principal sum, nor rent reserved or payable upon any lease or tack), for any definite and certain term, so that the total amount of the money to be paid can be previously ascer-

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ed as to secure the payment not only of the principal sum of 300*l.* with interest, but the payment also of the premiums of 23*l.* 14*s.* 7*d.* upon the life of Mr. Spencer. It therefore falls under the head of bonds for securing sums payable at stated periods for a definite term, and the instrument ought to have had an additional stamp of 1*l.* 10*s.* affixed to it. If the payment of the premiums be secured so long as the principal sum remains unpaid, then the bond is for securing sums payable at stated times for an indefinite period, and in that case an additional stamp of 2*l.* was necessary. The plaintiffs have treated the bond as securing the payment of the premiums, by seeking to recover in the present action the amount of one of such premiums in addition to a portion of the principal sum secured. The proviso at the end of the instrument was clearly introduced for the benefit of the obligees. The obligors expressly bind themselves

tained—the same duty as on a bond of the like nature for the payment of a sum of money equal to such total amount.”

“Bond in England given as a security for the payment of any annuity (except upon the original creation and sale thereof), or of any sum or sums of money at stated periods (not being interest for any principal sum, nor rent reserved or payable upon any lease or tack), for the term of life, or any other indefinite period, so that the whole money to be paid cannot be previously ascertained—where the annuity or sum secured shall amount to 10*l.*, and not amount to 50*l.* per annum, duty 2*l.*”

The general directions respecting bonds are, so far as they are

material to the present question, as follows:—“And, where in England, any bond for the payment or transfer, or for the performance of any covenant for the payment of any sum of money or annuity, or any share in any of the stocks or funds before mentioned, shall be contained in one and the same deed or writing, with any other matter or thing in this schedule specifically charged with any duty (except any declaration of trust of the money, annuity, stock, or fund secured), such deed or writing shall be charged with the same duties as such bond and other matter or thing would have been charged with if contained in separate deeds.”

"to pay the annual premiums respectively, which shall, during the continuance of the said loan, become payable on a certain instrument or policy of assurance under the hands of three of the directors of the said association ;" whereby the capital stock and funds of the said association are, on payment of the premiums, liable to pay the representatives of Mr. Spencer a certain sum. In case half a year's interest upon the principal sum and one of the premiums were to become due and payable, the obligees might recover both. [*Platt, B.*—Suppose the obligors had stipulated to pay the premiums to some other office, would that fact have affected the question ?] In that case the principal sum only would have been recoverable by the obligees. *Annandale v. Pattison* (a), and *Dearden v. Binns* (b), cited on the motion for the rule, do not appear to apply to this case. In the former case the Court observed, that it was not a bond for securing any certain sum of money ; and further, that a distinct stamp was not necessary, in consequence of the indemnity of the principal to the surety, as the whole appeared to be one transaction. Here the defendant relies upon the express language of the bond.

Secondly : The stamp which the plaintiffs have had affixed since the trial, under the 13 & 14 Vict. c. 97, s. 14, does not remove the objection to the old stamp.—Upon this point he was stopped by the Court.

Bramwell and *J. Brown*, in support of the rule.—As to the last point, by the 14th section of the recent statute, the stamp which the Commissioners affix (as has been done in the present case), "shall be deemed and taken to signify and denote that the full amount of stamp duty with which such deed or instrument is by law chargeable has been paid ; and every deed or instrument upon which the same

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(a) 9 B. & C. 919.

(b) 1 Man. & Ry. 130.

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shall be impressed, shall be deemed *to have been duly stamped*, and shall be receivable in evidence in all Courts of law or equity, notwithstanding any objection made to the same as being insufficiently stamped." This adjudication of the Commissioners has the effect of a judgment in rem. [Parke, B.—You contend that their decision is conclusively binding upon us. If the instrument had had this new stamp upon it at the trial, that might be so; but the statute is not retrospective. Alderson, B.—The adjudication of the Commissioners may be said to be retrospective as regards the suit, but prospective as to the trial. The instrument, when so stamped, shall be deemed to have been duly stamped. Parke, B.—We are all of opinion that the statute has a prospective effect; and I may add, I think that when the Commissioners have adjudicated an instrument to be properly stamped, we are bound by their decision.]

As to the principal point, the bond is given for the sole object of securing the payment of the principal sum of 300*l.*, with interest. These premiums are not debts. The statute applies only to the payment of sums of money which are debts distinct and independent from the principal sum secured. This is all one transaction, as was held in *Annan-dale v. Pattison* (a), with the sole object of securing the re-payment of the principal sum advanced. [Parke, B.—My impression still is, that the premiums would be recoverable in addition to the principal sum, with interest.]

Cur. adv. vult.

ALDERSON, B., now said—This was a motion to enter the verdict for the plaintiffs, my Brother Parke having nonsuited the plaintiffs, with liberty to move to set that

(a) 9 B. & C. 919.

nonsuit aside and to enter the verdict for them. The question was simply whether the bond, which was the subject of the plaintiffs' claim, was properly stamped at the trial. The learned Judge was then of opinion, and, I believe, still retains the opinion, that the stamp was not sufficient, on the ground that the bond secured not merely the payment of the sum of 300*l.*, but certain premiums also on the bond. But the majority of the Court, the Lord Chief Baron, my Brother *Platt*, and myself, are of opinion that the stamp was sufficient. The condition of the bond states, that if the party bound shall re-pay the sum of 300*l.* advanced to him out of the funds of the Association, in certain amounts and at certain times, and if in the meanwhile he shall pay interest and the premiums due on the policy of assurance which was to be effected, then the bond is to be void; but it contains a proviso, that if there should be any default in payment of the interest, or of either of the instalments, or of the premiums, then the whole of the principal sum of 300*l.* shall become forfeited. But we think that this bond is not for the payment of the premiums, but of the principal sum only, with interest, and that nothing beyond that amount would be recoverable in case of default of payment of the interest, or instalments, or of the premiums. Since the trial, the bond has passed through the Stamp-office, and a "denoting" stamp has been affixed to it, and no objection could now be taken to the instrument with reference to the insufficiency of the stamp. The verdict must be entered for the plaintiffs, the majority of the Court being of opinion that the bond, when produced at the trial, was properly stamped.

PLATT, B.—It seems to me that we ought not to differ from my Brother *Parke*, without giving some reasons for our judgment; and therefore I shall add a few words to

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what has been said by my Brother *Alderson*. The words of the Stamp Act are these: "A bond given as security for the payment of any definite sum of money." The Act then goes on to state the sum for which each particular stamp is to be. Now, by this instrument, it appears that 300*l.* had been advanced, and that interest is payable on that sum; and the bond is to secure the payment of those amounts; but, for the purpose of providing a collateral security, the condition goes on to stipulate that an insurance shall be effected with the Company; that, in the event of the death of the borrower, the Company may have a fund out of which the money may be paid. Is that a security for more than the repayment of the principal sum and interest? The bond is dated the 12th of October, 1849, and the three instalments by which the 300*l.* is to be repaid are, respectively, 100*l.* on the 12th of October, 1850, the same amount and day in 1851, and the same in 1852; and upon default of any one of these payments the bond may be put in suit; as it may also be in default of the payment of the premiums of insurance. Now, supposing the borrower were to die, the premium would not become the property of the Company in addition to the interest. The Company assumes a burden connected with the premiums in question. The account would stand thus:—The interest is payable beforehand by the bond, and therefore 15*l.* is paid at the outset; and 23*l.* 14*s.* 7*d.* for the premium; the whole of which amounts to 38*l.* 14*s.* 7*d.* And therefore, if the borrower were to die within the first year, the Company would have to pay 499*l.*, and would incur a loss of 460*l.* At the end of the second year they would incur a loss of 421*l.*; and at the end of the third year, at the expiration of which time, at all events, the money was to be repaid, they would incur a loss of 382*l.*, supposing the party had in the interim died. That would be the result of the whole transaction. Can this

instrument be said to secure a larger amount than the principal sum advanced and the interest upon it? In my opinion it does not.

ALDERSON, B., added.—The premium never was a debt to the Company. It is always paid in advance, and the insurance fails if the premium is not paid. It is always for the future year, not for the past.

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Rule absolute(a).

(a) *Pollock*, C. B., was presiding at Nisi Prius.—*Parke*, B., had left the Court before the learned Barons delivered their judgments.

HANKIN v. BENNETT.

June 26.

THIS was an action of debt. The declaration stated, that the defendant, by his writing obligatory, under his seal, bearing date the 27th June, 1846, was bound to the plaintiff in the sum of 200*l.*, subject to a condition for making the same void if one Francis Gell and the defendant, or either of them, should pay to the plaintiff such costs as the plaintiff should, in due course of law, be liable to pay in case a verdict should pass for the defendant, or either of them, should pay to the plaintiff such costs as he should, in due course of law, be liable to pay in case the verdict should pass for the then defendant in an action pending, which had been brought by one C. in the name of the plaintiff, such costs to be first taxed by one of the Masters in the usual manner, the bond was to be void. The action mentioned in the condition was a *scire facias* on a judgment obtained by the plaintiff, and which had been assigned to C. by T. H., since deceased, of whom the plaintiff was executor. The action was tried at the Spring Assizes in 1848, when a verdict was found for the defendant. In the following Easter Term a rule nisi for a new trial was obtained. On the 14th of November following a fiat in bankruptcy issued against the defendant. In Hilary Term, 1849, the rule for the new trial was discharged. On the 29th of May the defendant obtained his certificate, and on the 22nd of August the costs were taxed:—*Held*, that, at the time the fiat issued, the defendant's liability under the bond was a mere contingent liability, and not a contingent debt, within the Bankrupt Act, 6 Geo. 4, c. 16, s. 56; and therefore that the plaintiff's claim for the costs was not barred by the defendant's certificate.

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fendant in a certain action then pending, which had been brought by one William Cozens in the name of the now plaintiff as plaintiff, such costs to be first taxed by one of the Masters in the usual manner. That, on the 4th of March, 1848, at the assizes holden in and for the county of Hertford, a verdict was found for the defendant in the said action, and the habeas corpora juratorum, annexed to the record, was returnable on the 15th April, 1848. That, on the 22nd August, 1849, the costs of the defendant in the said action were duly taxed at 542*l.* 3*s.*, which sum the plaintiff then became liable to pay to the defendant in the said action. That the now defendant and F. Gell had not, nor had either of them, then paid to the plaintiff the costs so taxed; whereby the said writing obligatory became forfeited.

The defendant pleaded (*inter alia*) that, on the 29th March, 1849, he became a bankrupt, and that the cause of action in the declaration mentioned accrued to the plaintiff before the defendant so became a bankrupt.— Upon which issue was joined.

The cause came on for trial before the Lord Chief Baron, at the Middlesex Sittings after last Hilary Term, when a verdict was found for the plaintiff for 200*l.*, subject to the opinion of the Court upon the following case:—

In Michaelmas Term, 59th Geo. 3 (1819), Thomas Hankin entered up judgment in the Court of Common Pleas against Joseph Smith and John Cozens for 6000*l.*, upon a warrant of attorney, dated 25th June, 1815, given by them to him to secure the payment of 3000*l.* then due from J. Smith to T. Hankin. J. Cozens died in the year 1837, and soon after T. Hankin died, having by his will appointed D. Hankin, the plaintiff in this action, his executor, who duly proved the same. The said Joseph Smith also died afterwards. In February, 1846, William Cozens, claiming to be assignee of the judgment debt under an assignment alleged to have been made by T. Hankin in his lifetime,

caused a scire facias to be issued out of the Court of Common Pleas, in the name of the now plaintiff, as the executor of T. Hankin, deceased, against the heir and devisees of J. Smith, for the purpose of enforcing payment of the amount of the judgment, whereupon the now plaintiff obtained a Judge's order, whereby it was ordered, that William Cozens should give security to the now plaintiff for the costs which he might be called on to pay in the event of the defendant succeeding in the said scire facias. The now defendant was proposed and accepted, together with one Francis Gell, as security for 200*l.*, and on the 27th June, 1846, they executed the bond upon which this action was brought.—The case then set out the bond and condition. The latter, after reciting the warrant of attorney, and judgment entered up in pursuance thereof, the assignment by T. Hankin to William Cozens of the debt so secured, the commencement of the action by William Cozens in the name of the now plaintiff, and the Judge's order for security for costs, proceeded thus:—"The condition of the above written bond or obligation is such, that if the above bounden F. Gell and J. Bennett, or either of them, shall and do well and truly pay or cause to be paid unto the said D. Hankin, such costs as the said D. Hankin shall in due course of law be liable to pay, in case the said W. Cozens shall discontinue, become nonsuit, or a verdict pass for the defendants, or any or either of them, or otherwise in relation to the said action, such costs to be first taxed by one of the Masters in the usual manner, then the above obligation to be void," &c.

The scire facias was tried at the Hertford Spring Assizes, 1848, when a verdict was found for the defendants. In Easter Term, 1848, William Cozens obtained a rule nisi to set aside the verdict, and for a new trial. In Hilary Term, 1849, that rule was, after argument, discharged. On the 14th of November, 1848, a fiat in bankruptcy issued against the now defendant, on his own petition, under which

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he was adjudged a bankrupt, and he obtained his certificate on the 29th of May, 1849. The defendants' costs on the scire facias were taxed at the sum of 54*l.* 2*s.* 8*d.*, on the 22nd of August, 1849, and judgment was then signed thereon against the now plaintiff.

The question for the opinion of the Court was, whether the plaintiff was entitled to retain the verdict on the issue joined on the third plea. If the Court should be of that opinion, then the verdict was to stand, but if not, it was to be entered for the defendant on that issue.

The case was argued (June 9 and 10) by

Cleasby, for the plaintiff.—The question is, whether this claim was proveable under the fiat as a *contingent debt*, within the meaning of the 6 Geo. 4, c. 16, s. 56. It is submitted that it was not. The case is similar to *Bird v. Moreau* (a), where the defendant obtained a verdict in July, and the plaintiff became bankrupt in August, and in the following Michaelmas Term final judgment was signed, and the plaintiff obtained his certificate, and it was held that he was liable to an execution for costs, notwithstanding the 6 Geo. 4, c. 16, s. 56. [*Platt*, B.—It is difficult to see what affidavit the plaintiff could have made in order to prove this under the fiat as a *debt*.] The circumstance of the security being in the form of a bond, does not render that a debt which is a mere contract to indemnify: *Ex parte Marshall* (b). To come within the 6 Geo. 4, c. 16, s. 56, it must be an ascertained debt payable on a contingency, and not a contingent liability. [*Pollock*, C. B., referred to *In re Willis* (c).] There the guarantee was for a sum certain; and consequently it was a contingent debt, and not a mere liability. *The South Staffordshire Railway v. Burnside* (d) decided, that the obligation to pay calls on railway shares did not create a debt pay-

(a) 4 Bing. 57.

(b) 1 Mont. & Ayr. 118, 145.

(c) 4 Exch. 530.

(d) 5 Exch. 129.

able on a contingency, but was only a contingent liability, uncertain in its nature, and incapable of valuation. In like manner, there is no debt proveable, where, on reference of a cause, the arbitrator awards a certain sum to be paid by a party who, before the costs are taxed, becomes bankrupt: *Haswell v. Thorogood* (a). So, in this case, there was no debt at the time of the bankruptcy, for the rule for a new trial was then pending; and until the taxation of costs, which took place after the certificate, it could not be ascertained whether any costs would be payable.

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C. E. Pollock, for the defendant.—The authorities as to proof of costs unascertained between party and party do not apply, for until taxation and judgment there is no debt. But here the defendant, as obligor, bound himself to indemnify the plaintiff against any costs to which he might be subject, and that duty attached immediately the liability accrued, that is, upon a verdict being found for the defendant in the *scire facias*. [*Platt*, B.—A rule nisi having been subsequently granted, there was no verdict until that was discharged. *Pollock*, C. B.—If the Court had arrested the judgment, there would have been no costs payable.] That is not a test, for even now a writ of error might be brought. The defendant has agreed to indemnify the plaintiff against such costs as he “shall, in due course of law, be liable to pay.” That liability attached upon the fifth day of the Term after the verdict. It was the plaintiff’s duty to procure the costs to be taxed: *Candler v. Fuller* (b). That verdict is not shewn to have been disturbed. In *Hodgson v. Bell* (c), the bond became forfeited before the bankruptcy, but the surety had not been called upon to pay any part of the sum for which he had become surety; and yet it was held that he was entitled to prove the

(a) 7 B. & C. 705.

(b) Willes, 62.

(c) 7 T. R. 97.

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claim as a debt under the commission: and Lord *Kenyon*, C. J., there said, "Where the debt accrues subsequent to the bankruptcy, it cannot be proved under the commission. . . . If the bond be forfeited at law before the bankruptcy, though in equity the money is not then payable, the Court will avail itself of the debt at law to protect the party who is in conscience entitled." [*Martin*, B.—If you can shew that the bond here was forfeited before the bankruptcy, your argument may succeed.] In *Brown v. Fleetwood*(a), *Parke*, B., in speaking of the difference between bankruptcy and insolvency, says, "It is clear that the insolvent is not discharged from any debt which cannot be proved before his discharge. It is different in case of bankruptcy, where the debt may either be valued at the time of the bankruptcy, or the party may wait until the contingency occurs." [*Martin*, B.—How can you shew that this was a *debt* before the bankruptcy?] In the case of bail bonds to the sheriff, forfeited before the bankruptcy by non-appearance, though judgment be not signed till after the defendant's certificate, it has been held that the debt was barred: 1 *Deacon & De Gex's Bankruptcy*, 264; *Bouteffour v. Coats*(b), *Dinsdale v. Eames*(c). Here a liability to pay a sum of money, but subject to an uncertain reduction, arose before the bankruptcy. The contingency upon which the debt became payable must eventually happen, although it does not occur till after the bankruptcy: *Ex parte Harrison* (d). The liability is certain, although the amount which ultimately is payable is uncertain at that time.

Cleasby in reply.—This was a mere contingent liability, and not a contingent debt. The bond was given to secure an uncertain sum; but the obligor was not to be lia-

(a) 5 M. & W. 21.
 (b) Cowp. 25.

(c) 2 B. & B. 8.
 (d) 3 M., D., & De G. 350.

ble beyond a certain amount. The penalty of the bond cannot ever be made the medium of proof, except where the bond is forfeited *before* the bankruptcy. [*Pollock*, C. B., referred to *Ex parte Tindal*(a).] The following cases are strongly in the plaintiff's favour:—*Ex parte The Lancaster Canal Company* (b), *Taylor v. Young* (c), *Hinton v. Acraman* (d). With respect to the costs, no debt due to the plaintiff arose before the bankruptcy. This was expressly decided in *Brough v. Adcock* (e).

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Cur. adv. vult.

The judgment of the Court was now delivered by

MARTIN, B. — This was a case for the opinion of the Court, and the question was, whether the plaintiff was entitled to retain a verdict which had been taken for him at the trial, upon a plea of the bankruptcy of the defendant.

The action was upon a bond, dated the 27th of June, 1846, the condition of which was—[His Lordship stated it, and proceeded.]

The action mentioned in the condition was a *scire facias* on a judgment obtained by the plaintiff, and which had been assigned to Cozens by Thomas Hankin, since deceased, of whom the plaintiff was executor.

That action was tried at the Hertford Spring Assizes, 1848, and a verdict found for the defendant. In the following Easter Term, a rule to shew cause why there should not be a new trial was obtained. On the 14th of November following, the fiat against the defendant issued. In Hilary Term, 1849, the rule for the new trial was discharged. On the 29th of May, the defendant obtained

(a) 8 Bing. 402.

(b) Mont. Cas. in Bank. 27.

(c) 3 B. & Ald. 521.

(d) 2 C. B. 367.

(e) 7 Bing. 650.

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his certificate, and on the 22nd of August the costs were taxed.

The question was, whether the action upon the bond for the purpose of recovering these costs was barred by the certificate. We are of opinion that it was not. The bond itself was not forfeited at the time when the fiat issued; if it had been, a question would have arisen whether the demand was proveable, under the authority of the case of *Hodgson v. Bell* (a); but it is quite clear that no action whatever could have been maintained upon the bond on the 14th of November, 1848, when the fiat issued; and the defendant, therefore, can derive no advantage from the principle laid down in the above case.

It was argued, however, that the liability contained in the condition of the bond was a debt payable upon a contingency, within the 6 Geo. 4, c. 16, s. 56 (the Bankrupt Act which was in force at the time when the fiat was issued against the defendant), and that it was proveable under the fiat, and the demand therefore barred. We think, however, that this liability was not *a debt* at all within the true meaning of the section. It was a contract to indemnify a nominal plaintiff, whose name was used by a third person, against such costs as the plaintiff might become liable to pay to the defendant in the suit, should the latter obtain judgment in his favour. It seems to us impossible to consider this *a debt*. It is a contingent liability, but not a contingent debt. The case of *Bird v. Moreau* (b) decides that the costs themselves would not be a contingent debt; à fortiori, therefore, we think a contract to indemnify against them cannot be one. In *Ex parte Tindal* (c), the nature of debts payable on a contingency, which were proveable under a fiat, was fully considered by Lord Chancellor Brougham, assisted by the late Lord Chief Justice Tindal and Mr. Justice Littledale; but

(a) 7 T. R. 97.

(b) 4 Bing. 57.

(c) 8 Bing. 402.

there is nothing to be there found to support the view that such a liability as the present was proveable under the 56th section of the late Bankrupt Act. In the case *In re Willis* (a), decided in 1849, this Court carefully avoided giving any opinion as to the right to prove upon a bond of indemnity when the damage was not ascertained at the time of the claim to prove. That was a case arising upon a guarantee to pay a sum certain—a very different contract from the present.

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It is proper to add that, by the new Bankrupt Act, 12 & 13 Vict. c. 106, s. 177, the section in the former statute as to *debts* payable upon a contingency is re-enacted; and by the 178th section there is an extension of the right to claim and prove for a liability “to pay money on a contingency.” The judgment will be for the plaintiff.

Judgment for the plaintiff.

(a) 4 Exch. 530.

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IN THE EXCHEQUER CHAMBER.

(In Error from the Court of Exchequer).

June 1. THE EASTERN UNION RAILWAY COMPANY v. HART and Another.

The 7 & 8 Vict. c. lxxxv. "for making a railway from Colchester to Ipswich," empowered the Company to borrow money on mortgage. Section 49 enacted, "That the Company

THIS was a writ of error brought by the defendants below, on the judgment of the Court of Exchequer in *Hart and Another v. The Eastern Union Railway Company* (a).

Bramwell, (*Willes* with him) (b), argued for the plaintiffs in error in last Easter Vacation (May-12).—The declaration is bad. It may be conceded that, in the case of a *Bramwell*, (*Willes* with him) (b), argued for the plaintiffs in error in last Easter Vacation (May-12).—The declaration is bad. It may be conceded that, in the case of a

may, if they think proper, fix a period for the repayment of the money so borrowed, with the interest thereof; and in such case the Company shall cause such period to be inserted in the mortgage deed or bond, and upon the expiration of such period the principal sum, together with the arrears of interest thereon, 'shall be paid' to the party entitled to such mortgage or bond." By section 50, if no time was fixed in the mortgage deed for repayment, the mortgagee might, at the expiration of twelve months, demand payment of the principal and interest, upon giving six months previous notice; and the Company might at all times pay off the money borrowed upon giving the like notice. By section 51, if such interest remained unpaid for thirty days after it became due, and demand thereof made in writing, the mortgagee might either sue for the interest so in arrear by action of debt, or require the appointment of a receiver. By section 52, if such principal and interest were not paid within six months after the same became payable, and after demand thereof in writing, the mortgagee might sue for the same in any Court of law or equity, or, if his debt amounted to a certain sum, require the appointment of a receiver. The plaintiff lent to the defendants 1000*l.* upon the security of a debenture (in the form given in a schedule to the 7 & 8 Vict. c. lxxxv.) which provided that the principal was "to be repaid on the 1st of January, 1851."

Held, in the Exchequer Chamber, affirming the judgment of the Court of Exchequer—First, that where a corporation is created for certain purposes, with power to sue and be sued, to borrow money for the completion of those purposes, and to secure the repayment of such money by an instrument which on its face imports a covenant for repayment; if money be so borrowed and so secured, an action *prima facie* may be maintained against the Corporation on breach of the covenant.

Secondly, that in this case such right of action was not taken away or affected by the 7 & 8 Vict. c. lxxxv., since the 51st and 52nd sections of that Act did not give a right of action, but merely recognised it as already existing, and provided an additional remedy by the appointment of a receiver.

(a) 7 Exch. 246, where the pleadings and statutes cited are fully set out.

(b) Before *Coleridge*, J., *Wight-*

man, J., *Cresswell*, J., *Erie*, J., *Talfourd*, J., *Williams*, J., and *Crompton*, J.

private individual, an instrument of this nature would import a covenant for repayment on the day named therein; but the defendants below are a Company incorporated for certain purposes, and invested with certain powers, and they can do no act unless in furtherance of those purposes, and in conformity with those powers: *East Anglian Railway Company v. Eastern Counties Railway Company* (a), *Gage v. Newmarket Railway Company* (b). The Court below assumed that the mortgagees had a right of action under such an instrument, unless it was taken away or affected by the statutes in question; but the statutes must be looked at to ascertain whether a right of action exists, for they alone confer the power to borrow money. It is submitted that the legislature has not authorised the Company to borrow money under such circumstances that the nonpayment of it gives a right of action. This money was borrowed under the 10 & 11 Vict. c. ccxxv. (which, by sect. 1, incorporates the provisions of the 7 & 8 Vict. c. lxxxv., 8 & 9 Vict. c. xciv., and 9 & 10 Vict. c. xcvi.) Sect. 7 authorises the Company to borrow money on mortgage or bond, subject to the provisions of the 8 & 9 Vict. c. xciv. By sect. 9, mortgages or bonds already created are to have priority, for which reason special reference is made to the former Acts. The 7 & 8 Vict. c. lxxxv. s. 37, empowered the Company to borrow money, and, for securing repayment with interest, to mortgage the railway and future calls, or to give bonds. Section 40 prescribed the form of mortgage deed and bond. Section 49 enabled the Company, if they thought fit, to fix a period for repayment. Where no time is fixed, it is clear that the instrument would not operate as a covenant; and there is nothing in the statute to give it that effect, because the Company have exercised their option by appointing a day of payment. The rights of mortgagees are different from those

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(a) C. P., M. T., 1851.

(b) Q. B., E. T., 1852.

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of obligees. The former are entitled to their respective proportions of "the tolls, sums, and premises comprised in the mortgages, and of the future calls." The latter are entitled to be paid out of "the tolls or other property or effects of the Company." But if a mortgagee could maintain an action, he might deprive the bondholders of their security by taking the property and effects of the Company in execution: *Russell v. East Anglian Railway Company*(a). The 42nd section enacts, that no mortgage (although it shall comprise future calls) shall preclude the Company from receiving and applying to the purposes of the Company any calls, so long as the principal money due on mortgage does not exceed the amount of all the calls remaining to be made. But, by the 35th section, if there are no sufficient lands, property, or effects of the Company, whereon to levy execution, then such execution may be issued against any of the shareholders to the extent of their shares not then paid up. Those two sections are inconsistent, except upon the supposition that no action will lie on a mortgage deed; for otherwise a mortgagee might obtain under the 32nd section the unpaid calls, which, by the 42nd section, he is prohibited from receiving. The 51st and 52nd sections were construed by the Court below as recognising an existing right of action, and merely giving an additional remedy; whereas, in truth, they create the right of action, but only on certain terms. It is true that, in *Pontet v. The Basingstoke Canal Company*(b), the mortgage instrument contained no terms amounting to a covenant, neither did the private Act of the Company give a right of action. But *Pardoe v. Price*(c) is an authority to shew that a mortgage of this description creates no duty which can be enforced by action, independently of the provisions of the statute

(a) 3 Mac. & G. 125.

(b) 3 Bing. N. C. 433.

(c) 13 M. & W. 267; 16 M. & W. 451.

which authorised the loan. *Doe d. Myatt v. St. Helen's Railway Company* (a) does not militate against this view, but rather tends to shew that the remedy is in a Court of equity, which alone can administer the funds proportionably to the respective rights of the mortgagees. In *Doe d. Thompson v. Lediard* (b), the Court were bound by the express words of the Act of Parliament, which vested in the lessor of the plaintiff, as mortgagee, the legal estate in the tolls and toll-houses, but nevertheless subject to account to the other creditors in respect of their previous claims. The 7 & 8 Vict. c. lxxxv. is, however, repealed by the 10 & 11 Vict. c. clxxiv. [*Cresswell, J.*—The 6th section expressly provides that the repeal shall not affect contracts previously made; and the latter part of the 10th section is to the same effect.] The power to sue in respect of mortgages previously granted depends on the 43rd section. If that has not altered the remedy given by the previous Act, there is still the same necessity for a six months' demand in writing; if it has, then it only gives a right to sue for interest, and the remedy for the principal is by the appointment of a receiver. [*Williams, J.*—If so, there would be no remedy for the principal where the interest had been paid; since the section only authorises the appointment of a receiver where the interest remains due after demand.]

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Mellish for the defendant in error.—It is not contended that the Company can enter into contracts not authorised by the statutes; but this is an instrument to which they are empowered to put their seal. Then what is its meaning? The language imports a covenant to pay on the day named; and unless the statutes have qualified or altered the plain meaning of the words, they must receive their ordinary legal interpretation. The 10 & 11 Vict. c. clxxiv.

(a) 2 Q. B. 364.

(b) 4 B. & Ad. 137.

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is only material so far, that it preserves existing contracts made with the Companies thereby dissolved (sect. 6, 10), and incorporates the Companies Clauses Consolidation Act (8 & 9 Vict. c. 16). The 43rd section seems to have been inserted in error, for if it was intended to preserve the remedies given by the 7 & 8 Vict. c. lxxxv., it has only re-enacted one of its clauses (51), and a more effectual remedy is provided by the 8 & 9 Vict. c. 16. The 10 & 11 Vict. c. ccxxv., under which this money was borrowed, by section 7, empowers the Company to borrow money, subject to the provisions of the 8 & 9 Vict. c. xciv. That statute, however, contains no provision with respect to mortgages, except the 6th section, which enables the Company to mortgage the undertaking, *as authorised by the 7 & 8 Vict. c. lxxxv.* The case must therefore be governed either by the 7 & 8 Vict. c. lxxxv., or the Companies Clauses Consolidation Act. This instrument is within the very terms of the 49th section of the 7 & 8 Vict. c. lxxxv., which provides, that the Company may, if they think proper, fix a period for repayment of principal and interest, and in such case shall cause the period to be inserted in the mortgage deed, and upon the expiration of such period the principal and interest *shall be paid*. So that there is not only a covenant on the face of the instrument, but also a statutory declaration, which of itself is sufficient to give a right of action on nonpayment. In *Pontet v. The Basingstoke Canal Company (a)*, the instrument contained no words amounting to a covenant, and there was nothing in the Act requiring payment on a certain day. It would be unreasonable that the Company should have the option of making immediate payment, or of deferring it, according as the value of money fluctuated. The 49th, 51st, and 52nd sections may be read thus: the 49th gives a right of action upon non-payment on the day mentioned; then if the interest

(a) 5 Bing. N. C. 433.

or principal be in arrear for the periods specified in the 51st and 52nd sections, after demand in writing, the mortgagee may have a receiver appointed. The 49th and 52nd sections correspond with the 50th and 53rd of the Companies Clauses Consolidation Act. The 50th section of that Act only differs from the 49th of the special Act, inasmuch as it uses the words "shall *on demand* be paid." The 53rd section of the public Act enables the mortgagee to obtain the appointment of a receiver "without prejudice to his right to sue," and the same construction ought to be put on the 52nd section of the special Act. The 51st section of the latter Act, which provides for the recovery of interest, gives the option of suing or applying for the appointment of a receiver; and the 53rd section ought not to be construed as taking away the right to sue for the principal, without express words to that effect. The same provision applies to bondholders, so that if the mortgagee's right of action is postponed, that of the bondholder would be also. But the form of bond in the schedule of the Act shews, that such could never have been the intention of the legislature; and to give the instrument that effect, words must be imported contradicting the express terms of the condition. Again, in cases where no time is fixed in the mortgage deed for repayment, if the Company gave the notice prescribed by the 50th section, still the mortgagee could maintain no action until after the expiration of another six months, though, if the Company chose to pay the money according to their notice, the mortgagee would be bound to receive it. A mortgagee has no interest in the soil of the railway, for which he could bring ejectment: *Doe d. Myatt v. St. Helen's Railway Company* (a), neither has he any lien on the property of the Company: *Russell v. East Anglian Railway Company* (b).—Further, even on the construction contended for by the other side, this de-

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(a) 2 Q. B. 364.

(b) 3 Mac. & G. 125.

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claration is good. It appears by the dates on the record, that the action was not brought until six months after the money was due. The averment of demand is sufficient on general demurrer. It necessarily implies a demand in writing, for in no other way could it be made on the Company; and if that averment had been traversed, a demand in writing must have been proved.

Willes, in reply.—The meaning of the 49th section is, that the money shall be paid as provided for by the statute, that is, at the expiration of the respective periods mentioned in the 51st and 52nd sections. [*Williams*, J.—In the case of a bond without condition, the obligee would be entitled to payment after six months' previous notice; but, according to that argument, six months must elapse after the money became payable before he would have a right of action.] The instrument must be read as if the legislative provisions were incorporated with it. There must be a demand in writing after the expiration of the six months' notice. The averment of demand is not equivalent to a demand in writing: *Everard v. Paterson* (a).

Cur. adv. vult.

The judgment of the Court was delivered in Trinity Term (June 1) by

COLERIDGE, J.—This case was argued during the last vacation, and the question in substance is, whether, upon the declaration with the instrument declared upon imported into it on oyer, an action is maintainable against the Eastern Union Railway Company. We are of opinion in the affirmative; and consequently that the judgment of the Court below must be affirmed.

(a) 2 Marsh. 304.

It was not denied by the counsel for the plaintiffs in error that the instrument itself, on its face, apart from all considerations of disability in the parties, imported a covenant by the Company for the repayment of the money advanced on the day therein named for that purpose; or that, apart from such considerations, an action would be maintainable. But it was contended, in the first place, that, unless enabled by specific statutory provisions, the Company could not bind themselves by any such covenant as this instrument imports, so as to give a right of action to the covenantee; and secondly, that not only were there no such enabling clauses in the statutes relied on by the plaintiffs below, but that these statutes gave other specific remedies for recovery of the money advanced, which alone could be had recourse to; and, thirdly, it was contended, that even if an action could be maintained at all, it could only be after a demand in writing, of which there was no sufficient allegation in the declaration. Now, we are clearly of opinion, that where a corporation is created for certain purposes, with power to sue and be sued, to borrow money for the completion of those purposes, and to secure the repayment of such money by an instrument, which, on its face, imports a covenant for the repayment, if money be so borrowed and so secured, an action *primâ facie* may be maintained against the corporation on breach of the covenant. This appears to us a necessary inference from the premises just stated; and as all these premises concur in the present case, without more specific examination of the sections of the various statutes, this is enough to dispose of the first point made by the plaintiffs in error, a point indeed not very earnestly insisted on by their counsel.

The second point will require more detailed examination of the several statutes referred to in the argument. By the mortgage it appears that the money in question was borrowed under the powers conferred by the 10 & 11 Vict. c. ccxxv. (local); and money borrowed under that Act is by the 7th section borrowed under "the same or the like pro-

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visions as are contained in the 8 & 9 Vict. c. xciv." (local). This Act, in section 6, enables the Company there named to borrow on mortgage or bond, and for securing repayment to mortgage the undertaking "as authorised by the 7 & 8 Vict. c. lxxxv." (local). To this Act therefore we must look; and although, by the 10 & 11 Vict. c. clxxiv. (local), it is for general purposes repealed, yet for the purposes of the present inquiry it is in full force. The 37th section of this Act gave the power to borrow, and secure the repayment by mortgage of the railway and future calls. The 49th section enables the Company to fix a period for the repayment of principal and interest; and in such case they are to cause the period to be inserted in the mortgage deed, as they have done here; upon the expiration of which period, it is enacted, that the principal and arrears of interest shall be paid to the party entitled to the mortgage. It being undisputed that the money in question was borrowed, under such circumstances, in all respects, as satisfied the conditions imposed by the legislature, and that the instrument of security is in the form prescribed, it is clear, that if the statute had stopped here, an action would have been maintainable; and this is very important in determining the construction of the sections to which we are now coming, and upon which has arisen whatever difficulty has been felt by any members of the Court in the decision of the case. The plaintiffs in error contend that these, and these alone, *give* any right of action, "and" upon a condition not complied with; the defendants in error maintain that they *give* no right of action, only *recognise* a pre-existing right, and add thereto another specific remedy at the option of the borrower. These sections, 51 and 52, which may be read as one, commence with this preamble—"In order to provide for the recovery of the arrears of interest and costs, or of the principal and interest and costs, of any such mortgage or bond, at the respective times at which such interest, or such principal and interest and costs become due;" and the 52nd, as to principal and interest and

costs, enacts, that *if the same be not paid within six months after the same has become payable, and after demand thereof in writing*, the mortgagee or bond-creditor may sue for the same; or, if his debt amount to 5000*l.*, and, if not, in conjunction with other creditors to the amount of 10,000*l.*, may require the appointment of a receiver. The 51st section had previously provided, that, if interest shall remain unpaid for *thirty days after it shall have become due, and demand thereof shall have been made in writing*, the mortgagee or bond-creditor may either sue by action of debt, or require the appointment of a receiver. Now, as to both principal and interest, the 49th section had, as we have just seen, provided that they should be paid at the expiration of the period named in the instrument of security. If, then, we hold that the expiration of six months in the one case, and thirty days in the other after such period, are conditions precedent to any right of recovery by action, either we make the sections inconsistent, or we must suppose a mere right to be declared by the former section, that is, a right to repayment on a day named for that purpose by the debtor, but no remedy to enforce it given till thirty days or six months later, with the superadded condition of a demand in writing. This in itself would be unreasonable, and the more so because these terms certainly do not apply to the Company, which is left at liberty to pay at the day named in all events, a liberty which, considering how often such loans are made by way of investment, and how the value of money fluctuates in short periods of time, may, in many supposable cases, operate very inconveniently on the lenders. Moreover, if we give this construction to the 49th section, we must give the same to the 50th section, which provides for the case where no time has been fixed in the mortgage-deed or bond for the repayment of the money lent, and enacts that the lender may, at the expiration of, or at any time after the expiration of, twelve months from the date of the mortgage or bond, *demand payment* of the principal, with *all arrears* of interest, on

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giving six months' previous notice for that purpose. It would be strange to hold that, when, by six months' notice, the money under this section had become payable at the end of twelve months, still no action could be maintained till after six months' further default and demand in writing. Yet this must be the consequence, if we hold that the right of action is given by the 51st and 52nd sections only. But this construction, which involves such difficulties, is not a necessary one; all the enacting words of both will receive a full and satisfactory meaning, if we suppose them to provide only and specifically for the case of a default for thirty days or six months respectively after a demand made in writing, and, in either of those specified cases, to enact that the Company will be subject not only to an action, but, at the option of the lender, to have a receiver put on them, an arrangement which, whether advantageous or not to the lender, cannot but be highly inconvenient to them.

We agree with the Court below in thinking that this is the true construction of these sections, and it has the advantage of making them agree with the corresponding sections in the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, ss. 50, 51, 52, and 53, which provide for the repayment of money borrowed and interest, where a time has been fixed, and where no time has been fixed in the instrument; and the last of which expressly gives a right to require the appointment of a receiver after thirty days or six months' default, as the case may be, and after demand in writing, "*without prejudice to the right to sue.*"

The conclusion to which we have thus been brought on this point makes it unnecessary to consider whether a demand in writing is sufficiently alleged; and we are therefore of opinion that the decision of the Court of Exchequer ought to be affirmed.

Judgment affirmed.

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DOE *d.* SMITH *v.* ROE.

Nov. 2.

THIS was an action of ejectment, in which the declaration had been served on the 16th of June, 1852.

Where the declaration in ejectment was served before the Common Law Procedure Act, 15 & 16 Vict. c. 76, came into operation:—*Held*, that in such case the old proceeding by motion for judgment against the casual ejector was correct.

W. R. Cole now moved for judgment against the casual ejector.—It is submitted that this mode of proceeding is still the correct one, inasmuch as the declaration was served before the Common Law Procedure Act, 15 & 16 Vict. c. 76, came into operation. The 168th and 177th sections of that Act, which abolish this mode of proceeding, clearly apply to future proceedings only. [*Pollock*, C. B.—If this case were within the Act, such proceedings as have already been taken would become useless: it might be that the step was necessary to save the Statute of Limitations.]

PER CURIAM (*a*).—You may take your rule.

Rule granted.

(*a*) *Pollock*, C. B., *Parke*, B., *Alderson*, B., and *Platt*, B.

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Nov. 6.

MORGAN v. JONES.

The Common Law Procedure Act, 15 & 16 Vict. c. 76, which abolishes the old mode of proceeding for judgment as in case of a nonsuit, applies to cases where issue has been joined and default made in going to trial in pursuance of notice before that Act came into operation.

IN this case issue had been joined in July last, and notice of trial had been given for the Summer Assizes, but the plaintiff had not proceeded to trial in pursuance of his notice.

F. Bailey now moved for judgment as in case of a nonsuit. The question is, whether the Common Law Procedure Act, 15 & 16 Vict. c. 76, which abolishes this kind of judgment, applies to actions in which the default in not proceeding to trial took place before the Act came into operation. The question depends upon the 100th and 101st sections of the new Act (*a*), i.e., whether the word "thereupon," in the 100th

(*a*) The 100th & 101st sections are as follows:—

Sect. 100. "The Act passed in the 14th year of the reign of his Majesty King George the Second, intituled an Act to prevent inconveniences arising from delays of causes after issue joined, so far as the same relates to judgment as in the case of a nonsuit, shall be, and the same is hereby repealed, except as to proceedings taken or commenced thereupon before the commencement of this Act."

Sect. 101. "Where any issue is or shall be joined in any cause, and the plaintiff has neglected, or shall neglect, to bring such issue on to be tried, that is to say in town causes, where issue has been or shall be joined in, or in the vacation before, any Term, for instance, Hilary Term, and the plaintiff has neglected or shall neglect to bring the issue

on to be tried during or before the following Term and vacation, for instance, Easter Term and Vacation, and in country causes where issue has been or shall be joined in, or in the vacation before, Hilary or Trinity Term, and the plaintiff has neglected or shall neglect to bring the issue on to be tried at or before the second assizes following such Term, or if issue has been or shall be joined in, or in the vacation before, Easter or Michaelmas Term, then, if the plaintiff has neglected or shall neglect to bring the issue on to be tried at or before the first assizes after such Term, whether the plaintiff shall in the meantime have given notice of trial or not, the defendant may give twenty days' notice to the plaintiff to bring the issue on to be tried at the sittings or assizes, as the case may be, next after the expiration of the notice; and if

section, is to be construed as referring to "the statute" or "the case." Some doubt seems to be entertained by the officers of the Courts upon this point.

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PER CURIAM (a).—The word "thereupon" must be understood as having reference to "the statute," and not to the words "the case," in the 100th section. The object of the Procedure Act is to put an end to this form of proceeding, except in cases where, at the time the Act came into operation, the 4 Geo. 3, c. 17, had already been acted on; and therefore, if the rule for judgment as in case of a nonsuit had been obtained before that Act came into operation, it would have been correct to have proceeded with the matter. That is not the case here, and therefore there will be no rule.

Rule refused.

the plaintiff afterwards neglects to give notice of trial for such sittings or assizes, or to proceed to trial in pursuance of the said notice given by the defendant, the defendant may suggest on the record, that the plaintiff has failed to proceed to trial, although duly required so to do, (which sugges-

tion shall not be traversable, but only be subject to be set aside if untrue), and may sign judgment for his costs, provided that the Court or a Judge shall have power to extend the time for proceeding to trial, with or without terms."

(a) *Pollock*, C. B., and *Platt*, B.

1852.

Nov. 8.

DOE *d.* LEIGH *v.* HOLT.

The Common Law Procedure Act, 15 & 16 Vict. c. 76, has repealed the provisions of the 14 Geo. 2, c. 17, for judgment as in case of a nonsuit, as well in actions of ejectment as in ordinary actions.

THIS was an action of ejectment, in which issue had been joined and notice of trial given for the last Summer Assizes, but the lessor of the plaintiff had not proceeded to trial pursuant to his notice.

Milward now moved for judgment as in case of a nonsuit.—The course to be pursued in ordinary actions, when a plaintiff makes default in proceeding to trial, is pointed out by the 101st section (a) of the Common Law Procedure Act, 15 & 16 Vict. c. 76. The case of ejectment is provided for by the 202nd section (b), which is one of a series of clauses, commencing with the 168th, and headed “With respect to the action of ejectment.” [*Alderson, B.*—The 100th section (c) repeals the provisions of the 14 Geo. 2, c. 17, as to judgment as in case of a nonsuit, without any exception as to pending actions; then a substitute for that form of judgment is provided with respect to ordinary actions by the 101st section, and with respect to actions of ejectment by the 202nd. Does not that division tend to shew that the repeal is absolute as to all actions?] Since the 101st section does not apply to ejectments, it would

(a) *Ante*, p. 128.

(b) Sect. 202. “If, after appearance entered, the claimant, without going to trial, allow the time allowed for going to trial by the practice of the Court in ordinary cases after issue joined to elapse, the defendant in ejectment may give twenty days’ notice to the claimant to proceed to trial at the sittings or assizes next after the expiration of the notice; and if the claimant af-

terwards neglects to give notice of trial for such sittings or assizes, or to proceed to trial in pursuance of the said notice given by the defendant, and the time for going to trial shall not be extended by the Court or a Judge, the defendant may sign judgment in the form contained in the schedule (A) to this Act, marked No. 19, and recover the costs of defence.”

(c) *Ante*, p. 128.

seem that the 100th section was never meant to do so; for those enactments are headed "And with respect to judgment for default in not proceeding to trial." The remedy given by the 202nd section can only be adopted where the proceedings are commenced under the new Act by writ, and there is a "claimant" upon whom notice can be served. This Court has already decided that the proceedings must be continued according to the old law, where the declaration in ejectment has been served before the Common Law Procedure Act came into operation: *Doe d. Smith v. Roe* (a). [*Alderson, B.*—Before that statute, the defendant might have tried the cause by proviso, and he can do so still.]

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PER CURIAM (b).—We think there ought to be no rule.

Rule refused.

(a) Ante, p. 127.

(b) *Pollock, C. B., Alderson, B., and Platt, B.*

HOBSON v. NEALE.

Nov. 13.

THIS was a special case, involving a matter affecting the revenue, which had been directed to be sent for the opinion of this Court by an order made by the Court of Chancery before the long vacation.

Phinn, on the part of the Crown, now applied to the Court to fix a day for the argument. [*Parke, B.*—Does not the Chancery Procedure Amendment Act, 15 & 16

The 61st section of the Chancery Procedure Amendment Act, 15 & 16 Vict. c. 86, which enacts, that "it shall not be lawful for the Court of Chancery in any cause or matter to direct a case to be

stated for the opinion of any Court of common law," is prospective, and therefore does not apply to cases in which an order has been made before the Act came into operation (1st Nov. 1852).

Quære, whether the Act applies to cases involving questions in which the Crown is directly concerned.

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Vict. c. 86, by the 61st section, which enacts that "it shall not be lawful for the Court of Chancery, in any cause or matter, to direct a case to be stated for the opinion of any Court of Common Law, &c.," take away our jurisdiction?] That enactment is purely prospective, and the order in the present case was made before the Act came into operation. It is also doubtful whether the Act applies to cases in which the right of the Crown comes directly in question.

PER CURIAM.—The Act is clearly prospective, and therefore we have jurisdiction in this case.—The Court then stated that they would hear the case argued upon such day as the Attorney-General might be pleased to name.



GLEN v. LEWIS.

Nov. 4.

A defendant obtained a Judge's order for leave to plead several matters, but at the time the order was obtained, he was not enabled to draw up the rule, the Rule Office being then closed. He delivered the pleas, with notice that the rule would be drawn up and delivered as soon as it could be obtained. On the morning of the following day, the time for pleading having expired, the plaintiff signed judgment as for want of a plea:—*Held*, that the judgment was regular.

KARSLAKE moved for a rule, calling on the plaintiff to shew cause why the interlocutory judgment signed herein should not be set aside for irregularity, and why the rule to plead several matters should not stand, and why the pleas authorised to be pleaded should not be re-delivered, without any further summons or order to plead several matters.

The action was commenced in the early part of July last, and the declaration was served on the 22nd of that month. On the 30th, a summons for leave to plead se-

veral matters was taken out, but no application was made for further time to plead. On the 31st, the summons was heard before a Judge at Chambers, both sides attending; and the order was made, but at too late an hour for the rule to be drawn up that day, as the office was then closed. The defendant served the order upon the plaintiff the same evening, the time for pleading expiring upon that day, and the pleas were delivered with a notice, that the rule would be drawn up and served as soon as it could be obtained from the office. On the 2nd of August, the Monday following, at eleven A. M., the plaintiff signed judgment as for want of a plea.—The defendant pursued the proper course, and the judgment was irregularly signed. In *Maynard v. Bright* (a), it was held that where a defendant, under a rule nisi for that purpose, files pleas of several matters, annexing to the plea a copy of the rule nisi, indorsed with a notice that a rule absolute to plead several matters will be served as soon as it is drawn up, the plaintiff may not sign judgment as for want of a plea, if the time for pleading should expire before the rule absolute be obtained. That is an express authority in the defendant's favour; and that mode of practice appears to be the correct one, by reference to 1 Tidd, Prac. 9th ed. 657; and 1 Chit. Arch. 260. [*Alderson*, B.—In all the numerous cases which have come before me at Chambers, the invariable practice has been, where the defendant has not time to draw up the rule to plead several matters, to apply to have the time for pleading enlarged. The defendant might and ought to have done so in this case. *Pollock*, C. B., referred to *Wilkes v. Ottley* (b).]

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POLLOCK, C. B.—The course the plaintiff adopted was perfectly correct; and therefore, upon the point of irregu-

(a) 3 Brod. & Bing. 256.

(b) 2 Nev. & P. 99.

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larity, there will be no rule. The defendant, however, may take a rule nisi, upon the production of an affidavit of merits, and on payment of costs; otherwise

Rule refused (a).

The rest of the Court concurred.

(a) See the Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 81.

Nov. 19.

GOODLIFFE v. NEAVES.

The 27th & 28th sections of the Common Law Procedure Act, 15 & 16 Vict. c. 76, apply only to cases of future non-appearance. Therefore, where the plaintiff entered an appearance for the defendant *sec. stat.* before that Act came into operation, and afterwards filed a declaration indorsed with notice to plead, but gave the defendant no notice of the filing thereof:—*Held*, that judgment signed for want of a plea was irregular.

THIS was a rule calling on the plaintiff to shew cause why the judgment signed in this case, and execution thereon, should not be set aside for irregularity.

The action, which was debt, was commenced by writ of summons issued on the 29th of September, 1852, and served on the following day. No appearance having been entered by the defendant, the plaintiff, on the 8th of October, entered an appearance *sec. stat.* On the 27th of October a declaration was filed, indorsed with notice to plead in eight days, otherwise judgment; but no notice was given to the defendant of the declaration having been filed. On the 5th of November final judgment was signed for want of a plea, and on the following day execution issued.

T. Jones shewed cause.—The judgment is regular. By the 62nd section of the Common Law Procedure Act, 15 & 16 Vict. c. 76, “No rule to plead, or demand of plea, shall be necessary; and the notice to plead indorsed on the declaration, or delivered separately, shall be sufficient.” Therefore, if that section governs the case, the defendant was not entitled to any notice to plead. But reliance is placed on the 28th section, which provides, that in case of

non-appearance, where the writ of summons is not specially indorsed, it shall be lawful for the plaintiff "on filing an affidavit of personal service of the writ of summons, or a Judge's order for leave to proceed under the provisions of this Act, and a copy of the writ of summons, to file a declaration, indorsed with a notice to plead in eight days, and to sign judgment by default at the expiration of the time to plead so indorsed as aforesaid." It is true that in this case no copy of the writ of summons was filed; but that is not necessary where there is an affidavit of personal service of the writ, but only where a Judge's order is obtained for leave to proceed. No purpose would be served by filing a copy of a writ which has reached the defendant. [Parke, B.—There has been a regular appearance according to the old law, so that the defendant was completely in Court, therefore the provisions of the new law as to non-appearance have no application whatever. The 28th section clearly applies only to cases of future non-appearance. Unless the clause be so read, judgment may be signed against a defendant who has had no notice of declaration, nor been called upon to plead.] Such will be the practical effect of the statute, in cases where a defendant omits to appear; and if no notice is requisite under the new law, a fortiori it cannot be necessary where the party has appeared. The legislature has abolished the needless forms of notice of declaration, rule to plead, and demand of plea, without any exception as to pending actions. Where it is intended that the former practice should prevail, that is specially provided for, as in the 24th and 26th sections. The legislature has adopted the doctrine of the French law, '*election de domicile*,' that is, a defendant who does not appear is considered as having elected to make the office of the Court the place for service of proceedings on him (a). [Alderson, B.—The 12 Geo.

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(a) See Répertoire de Jurisprudence, par M. Merlin, tit. "Domicile Elu," s. 1.

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1, c. 29, and 2 Will. 4, c. 39, enable a plaintiff to enter an appearance for the defendant, and proceed thereon to judgment and execution. Therefore, at the time the Common Law Procedure Act came into operation, the plaintiff was bound to proceed in the same manner as if the defendant had himself entered an appearance. Now in that case he must have proceeded under the old law, and why should he not do so now?] The policy of the Act was to render proceedings more simple and speedy, and there is no reason for preserving a distinction at variance with that policy.

J. Brown appeared to support the rule, but was not called upon.

POLLOCK, C. B.—The rule must be absolute. It appears to me that the 15 & 16 Vict. c. 76, does not apply to this case, and that the plaintiff ought to have proceeded as if that Act had never passed.

PARKE, B.—I am of the same opinion. The statute does not apply where an appearance has been already entered, but only to cases of future non-appearance after service of the writ. The 26th section, which abolishes the provisions of the 12 Geo. 1, c. 29, and 2 Will. 4, c. 39, as to appearance, preserves the effect of those enactments “so far as may be necessary to support proceedings heretofore taken;” so that, by the express words of the statute, this appearance remains in force. The other sections of the statute provide for cases of future appearance or non-appearance; and where the appearance is in person, it requires a statement of a domicile of the party where proceedings may be served. Then, under the old law, this declaration ought not only to have been filed, but notice of the filing should have been given to the defendant. With respect to the 62nd section, it may be that, if a declaration is filed, no

notice to plead, rule to plead, or demand of plea is necessary. But that we need not decide, for this judgment is clearly irregular.

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ALDERSON, B.—I am of the same opinion. The plaintiff is in this difficulty: either the defendant has appeared, or he has not. If he has not appeared, before the statute took effect, according to the old law, it is clear that the plaintiff must proceed under the new law with respect to non-appearance. If the defendant has appeared according to the old law, then the plaintiff must proceed upon that appearance. The defendant has not in fact appeared, but he has done that which, under the old law, was by the act of the plaintiff to be treated as an appearance, and which placed the defendant in the same situation as a person who had appeared. Then, what is there in the new Act which says that he shall be treated as a person who has not appeared? All the sections apply to future non-appearance only. Whether the plaintiff ought to proceed according to the old or the new law, is a point upon which I give no judgment.

PLATT, B., concurred.

Rule absolute.

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Nov. 15, 17.

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Pleadings specially demurred to before the Common Law Procedure Act, 15 & 16 Vict. c. 76, came into operation, are not affected by its provisions.

To trespass de bonis asportatis, the defendant pleaded, that by indenture of the 29th July, 1847, it was agreed between Q. and the defendant, who then, and during all the time thereafter mentioned, was possessed of certain premises for a term unexpired therein, that Q. should hold the premises as tenant at will to the defendant, at the yearly rent of 150*l.*, payable quarterly; for which rent it should be lawful for the defendant to distrain, as landlords may for rent reserved on

leases for years; that Q. held the premises under the indenture and agreement; that rent for three years and a quarter, during all which time Q. held the premises under the indenture as such tenant, and the defendant was possessed of them as aforesaid, became due; whereupon the defendant distrained the goods for rent. The plaintiff demurred, after setting out on oyer the indenture, whereby, after reciting that the premises in question were demised by M. to Q. for twenty-one years wanting one day; and that the defendant had consented to lend Q. 400*l.*, on the same being secured as thereafter mentioned: it was witnessed that Q. demised the premises by way of mortgage to the defendant, at a peppercorn-rent, and it was further agreed, that Q. should hold the premises as tenant at will to the defendant, at the yearly rent of 150*l.*, with power of distress:—*Held*, that the plea was bad, for not alleging a seisin in fee in the defendant, or deducing a title so as to enable him to distrain the goods of the plaintiff, who neither was a party to the deed nor claimed under Q.

TRESPASS de bonis asportatis.—Plea, that, before the said time when &c., by a certain indenture made between one Samuel Quested of the one part, and the defendant of the other part (profert), it was agreed between S. Quested and the defendant (who had then become, and was, and from thence during all the times hereinafter mentioned was, lawfully possessed of the messuages and premises hereinafter mentioned or referred to, for a certain term and period of time then to come and unexpired therein,) that S. Quested should hold certain messuages and premises in the said indenture particularly mentioned as tenant at will to the defendant, at the yearly rent of 150*l.*, payable quarterly, at Lady-day, Midsummer-day, Michaelmas-day, and Christmas-day, in every year, for which rent it should be lawful for the defendant to distrain on the said premises, or any part thereof, as landlords may for rent reserved on leases for years; but that it should be lawful for the defendant at any time to determine such tenancy, by leaving notice in writing for such purpose on the said premises; and that he should apply the rent when received in such manner, and upon such trusts and purposes as in the said indenture mentioned, prout patet, &c.—Averments, that S. Quested held and enjoyed the messuages and premises as tenant thereof to the defendant, under and by virtue of the said indenture and

the agreement therein contained, from the time of the making of the indenture continually until, and at the said time when &c.; and that before the said time when &c., the sum of 487*l.* 10*s.* of the rent aforesaid, for a period of three years and a quarter, became and was due and in arrear from S. Quested to the defendant, and at the said time when &c. remained in arrear. Whereupon the defendant, being so possessed as aforesaid, distrained the goods in the declaration mentioned, the same then being upon the said messuage and premises, for the arrears of rent; *quæ sunt eadem, &c.*—Verification.

On the 15th of May, 1852, the plaintiff, after setting out the indenture on oyer, demurred specially, on the grounds (among others) that the plea did not shew with sufficient certainty what estate or interest the defendant had in the premises at the time S. Quested agreed to hold the same as tenant at will to the defendant; and that the allegation, that the defendant was lawfully possessed of the same for a certain term and a period of time then to come and unexpired therein, was too general and uncertain.

The indenture set out on oyer was dated the 29th of July, 1847, and recited an indenture of lease, dated the 24th of May, 1847, between S. Muggeridge of the one part, and S. Quested of the other part, whereby certain premises were demised to S. Quested for the term of twenty-one years wanting one day, from the 25th of December, 1844, at the yearly rent of 128*l.* And after stating in the recited indenture that the premises were part of the premises demised by J. Ward to W. Wheelwright by indenture of lease, dated the 2nd of December, 1824, for the term of twenty-one years from the 25th of December then last, and that therein was contained a covenant for granting further leases for terms of twenty-one years, until the expiration of the term therein mentioned; and that the

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last-mentioned indenture of lease and term thereby demised were vested in J. Muggeridge, with the benefit of such covenant for further leases; and that the indenture contained a covenant on the part of Muggeridge to obtain a renewal of such lease, and on the same being obtained to grant to S. Quested another lease for twenty-one years; also reciting that S. Quested having occasion to borrow 400*l.*, J. Souster (the defendant) had agreed to lend it him: it was witnessed that S. Quested granted, bargained, sold, and demised to J. Souster the premises comprised in and demised to S. Quested by the recited indenture of lease of the 24th of May, 1847, to hold from the date of those presents, for the remainder of the term of twenty-one years (wanting one day), by the said lease granted, (which reversion and benefit of such covenants for renewal S. Quested agreed to stand possessed of in trust for J. Souster), paying, therefore, during the continuance of the demise, the rent of a peppercorn. Provided, that if S. Quested should pay to J. Souster interest at the rate of five per cent. half yearly, and the principal money on the 29th of July, 1849, J. Souster should surrender and assign to S. Quested the premises for the residue of the term.—(The indenture, after stating covenants on the part of S. Quested to pay the principal money and interest, and the rent reserved by the recited indenture of lease, &c.; and that until default in payment S. Quested should hold the premises, proceeded)—And it is further agreed, that S. Quested shall hold the said premises as tenant at will to J. Souster, at the clear yearly rent of 150*l.*, payable at Lady-day, &c.; for which rent it shall be lawful for J. Souster to distrain on the premises, or any part thereof, as landlords may for rent reserved on leases for years, but that it shall be lawful for J. Souster at any time to determine such tenancy by notice in writing, &c.

On the 21st of May, 1852, the defendant joined in demurrer.

T. Jones appeared in support of the demurrer; but the Court called on

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Macnamara to support the plea.—The plea was open to special demurrer only, and the 15 & 16 Vict. c. 76, s. 51, enacts, that “no pleading shall be deemed insufficient for any defect which could heretofore only be objected to by special demurrer.” That clause has a retrospective operation. The word “deemed” means judicially deemed. The language is not that “no pleading shall be specially demurred to after this Act comes into operation.” [*Platt*, B.—The 51st section seems to have reference to the 50th. *Alderson*, B.—The 51st section abolishes special demurrers; then the 52nd section provides a remedy in case of informal pleading, but the words of the latter section are, “if any pleading *be* so framed as to prejudice,” &c., not “shall have been so framed,” &c.] This is a remedial statute, having for its object the rendering more simple the pleadings and practice in the Superior Courts, and ought therefore to receive a liberal construction. Whenever the legislature intended that pending proceedings should be excepted from the operation of the statute, it is so expressed: as in the 10th section, which repeals certain provisions of the 2 Will. 4, c. 39, respecting writs; the 12th section, which provides for writs in force at the commencement of the Act; the 24th section, which abolishes writs of distringas; the 26th section, which repeals the 12 Geo. 1, c. 29, and 2 Will. 4, c. 39, as to appearance; the 92nd section, which abolishes rules to compute; and the 100th section, which repeals the 14 Geo. 2, c. 17 so far as it relates to judgment as in case of a nonsuit. There are some clauses which materially affect the rights of parties, and which nevertheless apply to pending proceedings, as, for instance, the provisions as to writs of error. [*Alderson*, B.—There no injustice is done, for the party would have six years from the time the Act came into operation,

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to sue out his writ of error. *Pollock, C. B.*—These provisions as to pleading do not stand alone, but the statute must be read as a whole. It commences with a recital, “that the process, practice, and mode of pleading in the superior Courts of common law at Westminster may be rendered more simple and easy.” It then enacts, that the Act shall come into operation on the 24th of October, 1852, and proceeds to make provision for future writs, the 10th section being apparently an exception. It then provides for appearance, joinder of parties, joinder of different causes of action, determination of questions of fact without pleadings, and pleadings in general. Under the latter head, it first abolishes all unnecessary and fictitious statements; it then allows either party to demur generally; and goes on to say, that no pleading shall be deemed insufficient for any defect which was formerly ground of special demurrer only; and it provides a remedy where pleadings are calculated to embarrass. How can those enactments apply to a joinder of issue on a matter of law before the statute came into operation? *Parke, B.*—The well-known maxim of law is “*Nova constitutio futuris formam imponere debet, non præteritis.*” We must therefore read the Act as if its words had been, “no *future* pleading shall be deemed insufficient, &c.” The rule as to the construction of statutes was fully considered by this Court in *Moon v. Durden (a)*.] The foundation of the maxim referred to is, that it cannot be supposed that the legislature meant to do injustice; but there is a distinction between a vested right of action or defence, and the mere opportunity of taking advantage of a formal defect. That is well explained in an American case: *The People v. Tibbett (b)*, where the question was, whether an Act passed for facilitating proceedings in informations of quo warranto affected an information then pending. The Court admitted the general principle, pro-

(a) 2 Exch. 22.

(b) 4 Cowen, 384.

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hibiting any interference with vested rights, which had been elaborately discussed not long before by Chancellor *Kent* in *Dash v. Van Kleeck* (a), but thus drew the distinction between an alteration of rights or an alteration of remedies or mere procedure:—"What right is taken away? Are the defendants divested of their defence upon the merits? Their saying that the proceeding is hastened in point of form makes nothing for them. They have no right to complain of this. It is complaining that he is put upon his defence to-day, whereas he had a right to delay it till the morrow; a singular head of vested rights, a *right to delay justice*. . . . The pretence of the defendant does not merit the name of *right*. It relates to the *remedy*. The Act merely says that, under its regulations, the questions between the parties may, peradventure, be brought to trial six months earlier than they would otherwise have been. This is a usual subject of legislative interference. Indeed the Court might do the same thing independent of the legislature. Suppose they were to make an order that all rules to plead should be ten days instead of twenty, would it lie with the parties interested to gainsay this? . . . At this rate, every statute by which the collection of debts or the trial of rights is rendered more speedy or effectual, would be inapplicable and void in reference to subsisting rights:" Wise's Common Law Procedure Act, pp. 2—4. There are various instances of Acts of Parliament being so construed as to have a retrospective effect. In *Freeman v. Moyes* (b), the 3 & 4 Will. 4, c. 42, s. 31, which rendered executors liable for costs of actions brought in their representative capacity, was held to extend to actions commenced before the statute came into operation but tried afterwards. [*Parke, B.—Littledale, J.*, dissented from that judgment, and I cannot help thinking with strong reasons.] *Brooks*

(a) 7 Johns. 503.

(b) A. & E. 338.

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v. Bockett (a), Hodgkinson v. Wyatt (b), Doe d. Johnson v. Liversedge (c), and Bell v. Smith (d), also afford instances of statutes having a retrospective effect. There is no hardship in the case, as the plaintiff might apply to amend without costs.—He then referred to Wise's Common Law Procedure Act, p. 86, note.

POLLOCK, C. B.—I am clearly of opinion that the statute in question does not apply to this case.

PARKE, B.—It is plain to my mind that these clauses ought to be construed prospectively. To give them a retrospective effect would be unjust; for the parties have demurred on the faith that they were entitled to do so. The 50th section provides that, *for the future*, judgment on demurrer shall be given according to the very right of the cause. The 51st section declares that, for the future, there shall be no special demurrers; then, by the 52nd section, instead of demurring specially, the parties are enabled to apply to a Judge to amend the pleadings when so framed as to prejudice, embarrass, or delay the fair trial of the action. If the clauses be so read, all these enactments are rendered consistent.

ALDERSON, B.—It would be very strange to apply the 51st section to cases for which no remedy is provided under the 52nd. Formerly, ambiguity was ground of special demurrer, but ambiguity might not be such a defect as could be got rid of under the provisions of the 52nd section.

PLATT, B., concurred.

The case then stood over in order that *Macnamara* might consider whether he would amend the plea.

(a) 9 Q. B. 847.
 (b) 4 Q. B. 749.

(c) 11 M. & W. 517.
 (d) 5 Car. & P. 10.

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Macnamara argued in support of the plea (Nov. 17).—The plea discloses a sufficient justification for the distress. [*Parke*, B.—The common avowry of a distress for rent does not set out title, because the 11 Geo. 2, c. 19, s. 22, gives a statutory form; and therefore a lawful demise is implied. That statute, however, is confined to actions of replevin. This plea is defective, because it does not shew a seisin in fee in the defendant, or any estate sufficient to create a right to distrain the goods of a third person.] The defendant had an *interesse termini*, and if the plaintiff relied on his want of title, he should have replied it. [*Parke*, B.—It is consistent with every fact stated in this plea, that neither *Quested* nor the defendant had any interest whatever in the premises, but that, behind the back of the plaintiff, the one executed the deed, giving a power of distress, and the other accepted it.] Mere possession of land is sufficient to justify the seizure of goods, even as a distress for rent. [*Parke*, B.—No doubt possession gives a right to all the remedies which accompany property. If the plaintiff's goods had been wrongfully encumbering the defendant's land, the latter might have distrained them damage feasant, or he might have removed them to some convenient place. But, in order to justify a distress of this kind, the plea ought to commence by alleging a seisin in fee, and regularly trace a complete title down to the defendant. In the present case, there is only a title by estoppel between the parties to the deed, and it is not alleged that the plaintiff claims either through the defendant or *Quested*.] In *Angell v. Harrison* (a), there was a similar form of plea. [*Parke*, B.—That was a justification under the 11 Geo. 2, c. 19, s. 1. According to the authority of *Walker v. Giles* (b), the subdemise would not create a tenancy, so as to enable the defendant to distrain.]

(a) 17 L. J., Q. B., 25.

(b) 6 C. B. 662.

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Doe d. Dixie v. Davies (a) shews that a tenancy at will reserving rent may be created by a mortgage deed.

T. Jones was not called upon to argue.

PER CURIAM (b).—We are of opinion that the plea is bad, for the reasons already stated.

Judgment for the plaintiff.

(a) 7 Exch. 89. (b) *Pollock, C. B., Parke, B., Alderson, B., and Platt, B.*

PRICE v. HEWETT (a).

A declaration alleged that the defendant requested the plaintiff to lend him a sum of money, and falsely, fraudulently, and deceitfully represented to the plaintiff, that the defendant had attained the age of twenty-one years, and the plaintiff, confiding in the truth of the said representation and pretence, agreed with the defendant to lend, and did lend, to the defendant, and the defendant then borrowed of the plaintiff, a sum of

IN this case the declaration alleged, that the defendant requested the plaintiff to lend him a sum of money, and falsely, fraudulently, and deceitfully represented and pretended to the plaintiff, that the defendant had attained the age of twenty-one years, and the plaintiff, confiding in the truth of the said representation and pretence, agreed with the defendant to lend, and did lend, to the defendant, and the defendant then borrowed of the plaintiff, a sum of

of twenty-one years; and that the plaintiff, confiding in the truth of the said representation and pretence, did lend the defendant a sum of money, &c.; whereas the defendant had not, at the time of his making the said representation and pretence, attained the age of twenty-one, but was an infant under that age, as the defendant at the time of his making the said representation well knew; and that the defendant refused to repay the said loan, &c.; whereby the plaintiff had been damaged, &c. The Court permitted the defendant, under the Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 80, both to demur to this declaration, and to plead, first, not guilty, and secondly, a traverse that the plaintiff confided in the alleged fraudulent representation, upon an affidavit of the defendant's attorney, which stated that he was advised and believed that the defendant had, under the circumstances aforesaid, just ground to plead not guilty to the declaration, and also a traverse that the plaintiff confided in the alleged fraudulent representation, and that he was also advised and believed that the declaration would be held bad in substance on demurrer.

(a) This and the following case were decided in Hilary Term, 1853.

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money, upon the terms, amongst others, that the defendant should, for the securing the repayment to the plaintiff of the same, on the 28th of September, 1852, execute, and the defendant did execute, a certain warrant of attorney, authorising certain attornies therein named to appear for the defendant in the Court of Queen's Bench, and receive a declaration for him in an action of debt for 800*l.*, besides costs of suit as between attorney and client; whereas, in truth and in fact, the defendant had not, at the time of his making of the said representation and pretence, attained the age of twenty-one years, but was an infant under that age, as the defendant, at the time of his making the said representation, well knew; and that the defendant had hitherto refused to pay the said loan, and had obtained a Judge's order that the warrant of attorney should be taken off the file of the said Court, and be delivered up to be cancelled, and that a certain judgment which the plaintiff had signed against the defendant, under and in pursuance thereof, and all subsequent proceedings taken, if any, should be set aside, the defendant being such infant &c.; by means of which premises the plaintiff was greatly injured, and put to much expense and costs in and about the application of the said order, and in attending the hearing of the summons for the obtaining thereof, &c.

Field had obtained a rule under the Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 80, calling on the plaintiff to shew cause why the defendant should not be at liberty both to plead, first, not guilty, and secondly, a traverse that the plaintiff confided in the alleged fraudulent representation, and to demur to the declaration.

The affidavit in support of the motion, made by the defendant's attorney, stated, that the deponent had been advised and believed that the defendant had, under the circumstances aforesaid, just ground to plead not guilty

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to the declaration in this action, and also a traverse that the plaintiff confided in the said alleged fraudulent representation; and that he was also advised and believed that the declaration would be held bad in substance on demurrer, and that the objections to the same raised by such demurrer were good and valid objections in law.

Petersdorff shewed cause (a).—It is conceded that the defendant may have ground for objecting to the declaration, and for pleading to it at the same time; but this affidavit does not comply with the 80th section of the Procedure Act, 15 & 16 Vict. c. 76, under which the application is made. [*Parke*, B.—A case in *Siderfin*, of *Johnson v. Pye* (b), is a decision to the effect that this action does not lie.] That question may be settled on demurrer, but the affidavit is objected to on the ground that it does not obey the 80th section, by stating, that the several matters which the defendant proposes to plead are “respectively true in substance and in fact.” [*Alderson*, B.—That portion of the section merely applies to pleas in confession and avoidance. The defendant proposes to plead mere traverses.] The defendant puts in issue the plaintiff’s belief in the misrepresentation. [*Parke*, B.—The plaintiff’s cause of action is, that he has been damaged by the defendant’s fraud. Simple fraud gives no cause of action; and unless the plaintiff could shew that he has been injured by it, he would not succeed. *Alderson*, B.—You charge the defendant with fraud, and he denies it.]

Field, in support of the rule, was not called upon.

PARKE, B.—The rule must be absolute. The demurrer

(a) January 12, 1853.

(b) 1 Sid. 258; see *Green v. Greenbank*, 2 Marsh. 485.

had better be argued first, and that may dispose of the whole matter.

The rest of the Court (a) concurred.

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Rule absolute (b).

(a) *Pollock*, C.B., *Alderson*, B., and *Martin*, B.

the defendant's counsel, at the suggestion of the Court, amended

(b) In a case of *Lumley v. Gye*, which came before the Court in the present Michaelmas Term,

the affidavit in support of an application both to plead and to demur to the declaration.

CROSS and Another v. JORDAN.

PHIPSON moved (a) for leave to sign judgment on the writ of ejectment issued in this cause, under the 210th section of the Common Law Procedure Act, 15 & 16 Vict. c. 76. The affidavit in support of the motion stated, *inter alia*, that "three quarters of a year's rent was due from the tenant before the copy of the writ was affixed to the premises; and that, at the time the said copy was affixed, no sufficient distress was to be found upon the said premises countervailing the said arrears of rent."—It is submitted that this affidavit is sufficient. The 210th section of the Common Law Procedure Act, which follows the 4 Geo. 2, c. 28, in the form of the remedy there given to a landlord for the recovery of the possession of his property, states that, "in case of judgment against the defendant for non-appearance, if it shall be made to appear to the Court where the said action is depending, by affidavit, or be proved upon the trial in case the defendant appears, that half a year's rent was due before the said writ was served, and that no sufficient distress was to be found on the demised premises countervailing the arrears

Upon a motion for judgment on a writ of ejectment, under the 210th section of the Common Law Procedure Act, 15 & 16 Vict. c. 76, an affidavit, which states, *inter alia*, that three quarters of a year's rent was due from the tenant before the copy of the writ was affixed to the premises; and that, at the time the copy was affixed, "no sufficient distress was to be found upon the said premises countervailing the said arrears of rent," is sufficient.

(a) January 21, 1853.

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then due, &c., the lessor shall recover judgment and execution, in the same manner as if the rent in arrear had been legally demanded and a re-entry made." Now, although the present affidavit closely follows the statute, the case of *Doe d. Powell v. Roe* (a), if correctly decided, would seem to shew that it is insufficient. It is however submitted, that that decision cannot be supported. The affidavit there stated that a *year's* rent was in arrear, and that there "was no sufficient distress to be found on the premises to countervail the arrears of rent;" and *Cole-ridge, J.*, said, "That is not sufficient, as there may be a sufficient distress on the premises to countervail *half a year's* rent, although there is not sufficient to countervail a year's rent. Suppose five years' rent was due, the landlord is not to avail himself of the statute, merely because there is not a sufficient amount of property to countervail the arrears to that extent. A landlord has no right to lie by for such a length of time, and then seek thus to render the provisions of this statute available." In *Doe d. Gretton v. Roe* (b), in which the same point arose, but was not decided, *Maule, J.*, says, "Why is not the first affidavit sufficient? Is it not enough to countervail *all* the arrears then due?" [*Alderson, B.*—Are not the words "half a year's rent" the last antecedent to which the words "the arrears then due" are to be referred?] The words of the Act are simply the arrears, and are not "the *said* arrears." If they were, the affidavit might be bad. [*Parke, B.*—The landlord has a right to avail himself of this enactment, provided half a year's rent be due; and he equally has that right if ten years' rent be due. This affidavit sufficiently complies with the statute.]

POLLOCK, C. B.—The rule may go. This proceeding is not final, for the tenant may come in afterwards, and, on payment of costs, may stay further proceedings.

(a) 9 Dowl. 548.

(b) 4 C. B. 577.

PARKE, B.—I think that the right construction of the statute is that contended for by the learned counsel, notwithstanding the opinion of Mr. Justice *Coleridge*, with which I do not agree.

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ALDERSON, B., and MARTIN, B., concurred.

Rule absolute.

TODD v. KERRICH.

Nov. 4.

ASSUMPSIT.—The declaration stated, that the defendant had engaged the plaintiff in the capacity of a governess for the term of a year, at the salary of 60*l.*, and that he had wrongfully dismissed her before the expiration of that period, and had not paid her her salary, and had not provided her with board and lodging during the residue of the term.

A governess engaged at a yearly salary is not within the rule relating to domestic or menial servants, by which the contract of service may be dissolved upon a month's warning or a month's wages.

Pleas (inter alia) non assumpsit; secondly, that the defendant did not dismiss the plaintiff modo et formâ; and thirdly, leave and license.

At the trial, before *Jervis*, C. J., at the last Summer Assizes for the county of Surrey, it appeared that the defendant had engaged the plaintiff as a governess to his children, at a salary of 60*l.* per annum; and that the present action was brought to recover the amount of the residue of the year's salary, with a certain sum for board, &c. On the part of the defendant it was endeavoured to be shewn that, according to the terms of the engagement, either party was to be at liberty to put an end to the contract upon giving a month's notice; and that the defendant, in having given such notice, and having paid the amount due at the end of the month, was justified in dismissing the plaintiff. It did not, however, clearly appear what were the precise terms of the engagement. It was also contended, on the part

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of the defendant, that the plaintiff was liable to be discharged at a month's notice, or with a month's wages, in accordance with the rule as to menial or domestic servants. A verdict was found for the plaintiff, with 35*l.* damages, leave being reserved to the defendant to move to set that verdict aside, and to enter a verdict for him if the Court should be of opinion that the plaintiff came within such rule.

James now moved in pursuance of the leave reserved, and also for a new trial, on the ground that the verdict was against the evidence.—It is submitted, that a governess comes within the ordinary rule, which gives a master the power of discharging his servants upon giving a month's notice and wages, or the month's wages without such notice. *Nowlan v. Ablett* (a) favours this view. There the plaintiff agreed to enter the defendant's service as head gardener, and to have the management and superintendence of the defendant's hothouses, pineries, &c., at the wages of 100*l.* The plaintiff resided in a house belonging to the defendant, in his domain, but apart from the defendant's house. The plaintiff had the privilege of taking in apprentices, and had taken in two at 15*l.* per annum premium; and it was held that he was a menial servant only, and was only entitled to a month's warning. [*Parke, B.*—If a testator were by his will to leave an annuity to each of his menial servants, would the governess be included in the testator's bounty?] It is submitted that she would. *Beeston v. Collyer* (b) is also in point upon this subject (c).

Cur. adv. vult.

POLLOCK, C. B., now said.—In this case, we are of opinion that there ought to be no rule. The point reserved was, whether a governess is within the rule by which a menial

(a) 2 C. M. & R. 54.

(b) 4 Bing. 309.

(c) See *Blackwell v. Pennant*, 9 Hare, 551.

or domestic servant may be discharged with a month's notice or a month's wages. We are of opinion that she is not. The position which she holds, the station she occupies in a family, and the manner in which such a person is usually treated in society, certainly place her in a very different situation from that which mere menial and domestic servants hold. So far, therefore, as the question is to be treated as a matter of law, a governess does not fall within that rule. Upon the other point also, that the verdict was against evidence, there will be no rule.

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Rule refused.

DAVIS v. WALTON and Another.

Nov. 3.

THIS was a rule, calling on the defendants to shew cause why the Master should not tax the plaintiff his costs, notwithstanding the sum recovered by verdict was less than 5*l*.

The declaration stated, that the plaintiff was possessed of a wharf, called Ratcliffe Cross Wharf, adjoining to and abutting on the river Thames, upon which he carried on the trade and business of a wharfinger; and that all the subjects of our Lady the Queen of right had, and still of right ought to have, a free passage and navigation along that river for their ships, vessels, barges, and craft, going to, staying at, and returning from the said wharf, upon lawful occasions, and were then accustomed to frequent the same with their ships, vessels &c., to load and unload at, from, and upon the same wharf their goods, wares, and merchandise, for wharfage fees and reward to the plaintiff in that behalf payable; yet the defendants wrongfully, and injuriously, and without and otherwise than for the purpose of loading and unloading goods and merchandise at the said wharf, moved, placed, and fastened divers ships

A claim of a custom for the occupiers of wharfs on a navigable river to overlap the adjoining wharfs with their vessels, when being loaded or unloaded, does not raise any question of title to an incorporeal hereditament or a franchise, so as to exclude the jurisdiction of the County Court by the 58th section of the 9 & 10 Vict. c. 95.

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and vessels in the said river, so that the bows and divers parts of the said ships and vessels, and the rigging and tackle thereof, lay before, across, and alongside of, and overlapped the said wharf, in the way and passage aforesaid, for an unreasonable and unnecessary length of time, and thereby greatly obstructed and impeded the navigation to and from the same. By means whereof the plaintiff was hindered from possessing and enjoying the said wharf, and from carrying on his trade and business there, in so ample a manner as he might and would otherwise have done, and was thereby deprived of divers gains and profits &c.

The defendants pleaded, first, not guilty; secondly, that the defendants were the occupiers of a wharf next adjoining to the wharf of the plaintiffs, and abutting upon and on the banks of the river Thames; and that, by an ancient and laudable custom, from time immemorial used and approved of in and upon the said river, and by all persons frequenting and using the same and the wharfs on the banks thereof, and by the possessors and occupiers of such wharfs, any ship or vessel coming to a wharf on the banks of the said river lawfully may, and any occupier of any wharf lawfully may suffer or permit or cause any ship or vessel coming to his wharf for the purpose of being loaded or unloaded to, overlap the adjoining wharf, such adjoining wharf not being a public wharf, with the bows and rigging of such ship or vessel, if the space before such adjoining wharf so intended to be overlapped should be vacant and unoccupied by any other ships or vessels, &c.—The plea then averred, that the defendants, being occupiers of the wharf adjoining the plaintiff's, suffered the said ships and vessels, which then lawfully came to the wharf of the defendants for the purpose of being loaded and unloaded, to overlap the wharf of the plaintiff so adjoining the wharf of the defendants, with the bows &c. of the said ships, the space before the wharf of the plaintiff being unoccupied, and the wharf of the plaintiff not being

at any time a public wharf, as the defendants lawfully might do, *quæ sunt eadem*.—Verification.

The plaintiff joined issue on the first plea, and traversed the custom alleged in the second; and also new assigned, that the defendants, otherwise than for the purpose of loading or unloading goods &c. at the said wharf, moored, placed, and fastened the said ships &c., so that other parts of them than the bows and rigging overlapped the said wharf, and also moored &c. the said ships at times when the space was not vacant and unoccupied. To this the defendants pleaded not guilty.

The cause was tried before *Pollock*, C. B., when a verdict was found for the plaintiff, with 40*s.* damages; and the learned Judge refused to certify, to give the plaintiff costs under the County Courts Extension Act, 13 & 14 Vict. c. 61, s. 12. The present rule was obtained under the 13th section of that Act, on the ground that the action could not have been brought in the County Court, inasmuch as the title to an incorporeal hereditament was in question.

Hawkins now appeared to shew cause; but the Court called on

Lush to support the rule.—The 58th section of the County Courts Act, 9 & 10 Vict. c. 95, provides “that the Court shall not have cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise shall be in question,” &c. [*Parke*, B.—These pleadings do not raise any question of title to an “hereditament.” A traverse of a custom is not within any of the exceptions mentioned in the statute.] The term “franchise” will include a custom. The legislature could never have intended that a custom like this, affecting most persons who navigate the river Thames, should be tried by a County

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Court. [*Alderson, B.*—The only restraints on the jurisdiction of County Courts are those specified in the section itself; and it does not say that they may not try a right.]

PER CURIAM (*a*).—The rule must be discharged.

Rule discharged, with costs.

(*a*) *Pollock, C. B., Parke, B., Alderson, B., and Platt, B.*

Nov. 4.

DANIEL v. WILKIN and Another.

The defendants in an action of replevin having obtained a verdict, a rule for a new trial was granted, on the ground that certain evidence had been improperly admitted. This rule was made absolute. The plaintiff gave a fresh notice of trial, but afterwards gave notice of discontinuance, and the cause was not again tried. On the taxation, the costs of certain searches for documentary evidence (not including the evidence objected to), which had been made use of on the first trial, were allowed to the defendants, as well as the charge of drawing and copying the old briefs:—*Held*, that, as these matters would have been available if the cause had been tried again, such costs were properly allowed.

WILLES moved for a rule, calling on the defendants to shew cause why the Master should not review his taxation in this case. It was an action of replevin (*a*), and the defendants made cognizance as the receivers and bailiffs of the Crown for arrears of a fee-farm rent, whereof her Majesty was seised in fee in right of the Crown of England, in respect of certain tenements, of which the closes in which &c. were parcel. At the trial of the cause the defendants obtained a verdict; but that verdict was afterwards set aside, and a rule for a new trial was made absolute, on the ground that an ancient survey had been improperly admitted in evidence. The plaintiff had, without any alteration having been made in the pleadings, given fresh notice of trial; but had afterwards given notice of discontinuance, and the cause did not go down again for trial. Upon the taxation, the Master allowed the costs of a search for, and a translation of, certain documentary evidence, which had been made by an officer of the Crown in one of the Crown offices, and which evidence had been

(*a*) Reported 7 Exch. 429.

made use of at the former trial; but the Master did not allow the expenses of the survey, by reason of the improper admission of which the new trial had been obtained. The expenses of drawing and copying the old briefs were also allowed.

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Willes in support of the motion.—The allowance of the costs, with reference to the documents, ought not to have been made, upon the two following grounds: first, they were used at the first trial; as that trial became abortive, by reason of the decision of the learned Judge, neither party was entitled to costs as against the other. [*Alderson*, B.—These are the expenses of an effectual search, and would have been properly allowed on the first trial. The documents would have been available upon the second trial, if the plaintiff had proceeded with his action.] Secondly, this is a matter in which substantially the Crown is interested; the search was made by one of its officers, and he is bound to make the search as a part of the duties of his office. [*Parke*, B.—The remuneration for those services by the parties requiring the documents may be a part of the emoluments of his office.] At all events, the Master improperly allowed the expenses connected with the old briefs, which could only be applicable to the first trial.

POLLOCK, C. B.—There ought to be no rule. The objection to the Master's taxation is, that he has allowed for certain matters which were used at the first trial, and that that trial has been set aside. No doubt, the costs of all such matters as wholly belonged to that trial ought not to be allowed. But the costs for these inquiries and searches ought to be allowed as part of the costs of preparation for the second trial. In reality, all that the defendants lose, in consequence of the first trial having been set aside, are the costs of the day. I believe that to be the case. But

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all the matters now objected to are costs in the cause, as they would have been available at a future trial.

ALDERSON, B.—The parties ought to be placed in the same situation as that in which they were before they proceeded to trial on the first occasion. All that took place at the first trial ought to be regarded as wiped out by what took place owing to the mistake of the Judge. The defendants prepared themselves for a second trial; and as they were entitled to make their preparations on the supposition that the second trial would proceed properly, all their costs in so doing must be paid by the plaintiff if he discontinues the action.

PLATT, B.—The old briefs form part of the history of the cause; they are therefore not useless upon the second trial.

PARKE, B., concurred.

Rule refused.

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CROSSFIELD and ELIZABETH his Wife, Administratrix of
LOVELAND, v. SUCH.

Nov. 25.

DETINUE.—The declaration stated, that the plaintiff Elizabeth, on &c., delivered to the defendant certain goods and chattels, to wit, fifty chairs, twenty carpets, &c. (enumerating various articles of household furniture,) theretofore of W. Loveland, deceased, and then of the said plaintiff as administratrix, of great value, to wit, of the value of 500*l.*, to be delivered by the defendant to the plaintiff as such administratrix, on request.—Breach, non-delivery.

Pleas, first, (except as to certain specified articles) non detinet.

Secondly, as to the goods and chattels excepted, that the plaintiffs ought not further to maintain their action to recover the goods and chattels above excepted, or their value, because the defendant says that, after the commencement of this suit, the defendant delivered the said goods and chattels to the plaintiffs, and the plaintiffs then accepted the same from the defendant; and the defendant hath not from thence hitherto detained the said goods and chattels, or any or either of them, from the plaintiffs.—Verification and prayer of judgment.

Lastly, as to the damages by the plaintiff sustained by reason of the detention of the said goods and chattels above excepted: that the plaintiffs ought not further to maintain their action thereof, because the defendant now brings into Court the sum of 1*s.*, ready to be paid to the plaintiffs; and he further says, that the plaintiffs have not sustained damages to a greater amount than the sum of 1*s.*

livered up, the plaintiff could have no judgment to recover them or their value, but only to recover damages for their detention.

Secondly, that the third plea was also good, since detinue is a personal action in which compensation or amends is sought to be recovered, though the goods or their value is also sought to be recovered, and therefore money might be paid into Court under the 3 & 4 Will. 4, c. 42, s. 21.

To detinue of divers goods of the value of 500*l.*, as upon a bailment, to be re-delivered on request, the defendant pleaded, first, as to part, non detinet; secondly, as to the residue, that the plaintiff ought not further to maintain his action to recover them or their value, because, after the commencement of the suit, the defendant delivered them to the plaintiff, and the plaintiff accepted them from the defendant; thirdly, as to the damages by reason of the detention of those goods, payment of 1*s.* into Court, and no damages ultra. On demurrer to the second and third pleas:—*Held*, first, that the second plea was good, inasmuch as, the goods having been de-

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by reason of the said detention.—Verification and prayer of judgment.

General demurrer to the second and last pleas, and joinder therein.

Willes appeared in support of the demurrer (Nov. 17); but the Court called on

Lush in support of the pleas.—The judgment in *detinue* is for the recovery of the goods themselves, or their value if the plaintiff cannot again have them, and also damages for their detention. These pleas, therefore, answer the whole cause of action; for the goods having been delivered to the plaintiff, he could not have judgment for their recovery or their value, but would only be entitled to damages for their detention; and in respect of that, money is paid into Court. It differs from the action of *trover*, in which damages only can be recovered, and the judgment so far changes the property, that, even if the defendant offered to return the goods instead of paying damages, the plaintiff would not be bound to accept them. In *Vin. Abr.* “*Detinue*” (D. 5), pl. 58, 59, it is said, “*Detinue of diverse parcels of goods, tender of part of them is a good plea of them before verdict: Br. “Tender,” pl. 39, cites 1 R. 3. Contrà, after verdict, where the inquest taxes a sum in gross for damages of all the goods, and shall not sever the damages: Br. “Tender,” pl. 39, cites 1 R. 3.*” *Williams v. Archer* (a) was an action of *detinue* for railway scrip which had been re-delivered by the defendant to the plaintiff after the time of pleading and before trial; and it was held, that the verdict and judgment were properly confined to an assessment of damages for the detention. If, in such case, a defendant is entitled to the benefit of the re-delivery, *a fortiori* he is so where it occurs before plea.

(a) 5 C. B. 318.

[*Platt*, B., referred to Com. Dig. "Pleader," (2 X. 12).] Unless these pleas be allowed, the Court must give judgment, that the defendant re-deliver the goods which he has already delivered. The pleas do not amount to non detinet, because they admit a damage. Even assuming that they do not answer the whole cause of action, they are not on that ground bad, but the plaintiff ought to sign judgment for the part unanswered: *Henry v. Earl* (a). The money is paid into Court by way of compensation for the detention of the goods; and that the defendant was entitled to do under the 3 & 4 Will. 4, c. 42, s. 21. At all events, since the demurrer was after the 15 & 16 Vict. c. 76, came into operation, the Court will give judgment, under the 50th section, according to the very right of the cause.

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Willes, in support of the demurrer.—These pleas are bad, as pleaded to the damages only: *Atkinson v. Stephens* (b). They are clearly unnecessary; for on the issue on non detinet the jury may find specially that the goods have been delivered up, and so confine their assessment to damages for the detention: *Williams v. Archer* (c). [*Alderson*, B., referred to Brooke Abr. "Detinue de Biens," p. 48.] In Fitzherbert's Nat. Brev. 138 M., it is said, "And if a man have goods delivered to him to deliver over to another, and afterwards a writ of detinue be brought against him by him who hath right unto the goods, now if the defendant, depending the action, deliver the goods over to whom they were bailed to him to deliver, the same is a good bar in the action, because he hath delivered them according to the bailment made unto him." That, however, proceeds upon the ground that the defendant has *always* been ready to perform his duty, and has performed it by delivering the goods to the person entitled to receive

(a) 8 M. & W. 228.

(b) 7 Exch. 567.

(c) 5 C. B. 318.

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them. These pleas admit a wrongful detainer, and merely seek to bar the further maintenance of the action. *Uncore prist* is a good plea: Com. Dig. "Pleader," (2 X. 5). [*Lush* referred to *Clements v. Flight* (a).] Again, in Com. Dig. "Pleader," (2 X. 8), it is said, "So, if A. bails goods of C. to B., in detinue by C. against B., he may plead bailment by A. to be re-delivered to him, and pray that he may be garnished:" Mod. Ca. 216. That assumes that the defendant has done no wrong, although he has the goods; but where goods wrongfully detained are delivered up after the commencement of the action, that is only matter in diminution of damages. It would be unjust to the plaintiff to allow this form of pleading; because, if the jury, as in *Williams v. Archer*, should exclude from their consideration the value of the goods, there is nevertheless a damage for their detention, which entitles the plaintiff to maintain the action. If, on the other hand, he should discontinue, it would seem, from the case of *Woollen v. Smith* (b), that he would be liable to costs. To render this plea similar to that in *Henry v. Earl* (c), it should have contained an averment of acceptance of the goods *in satisfaction*. There is also this distinction between the cases,—that there evidence of payment could not have been given unless it were pleaded; here the jury may find a re-delivery, without any plea to that effect.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—In this case the plaintiff declared in detinue of divers goods of the value of 500*l.*, as on a bailment, to be re-delivered on request. As to part, the defendant pleaded non detinet. As to the residue, the second plea was, that the plaintiff ought not further to maintain his action to re-

(a) 16 M. & W. 42. (b) 9 A. & E. 505. (c) 8 M. & W. 228.

cover them or their value, because he says, that, after the commencement of the suit, the defendant delivered them to the plaintiff, and the plaintiff accepted them from the defendant. And the defendant pleaded separately to the damages by reason of the detaining of those goods, a plea of payment of 1s. into Court, containing the averment that the damages by reason of the detention of those goods did not exceed that sum. This was the last plea.

To these pleas there was a general demurrer. It was argued on the 17th inst.; and, after consideration and a reference to the old authorities, we are all of opinion that both pleas are good. As to the second, it is to be observed, that it is pleaded in bar only of the recovery of the goods specified, or their value; and it seems to be highly reasonable to hold, that the object of the suit being to recover the goods in specie, or their value to be assessed by the jury, and also damages occasioned by their detention, the first object is completely answered by the delivery to and acceptance by the plaintiff since the commencement of the suit, leaving the plaintiff to recover by the verdict of the jury the damages which he has sustained by the goods having been improperly detained. And the old authorities completely bear out this view of the case.

In Brooke's Abr., "Tender," pl. 39, referred to in Vin. Abr. "Detinue," (D. 5), pl. 58, it is said, "*Detinue de divers parcels de biens, tender del part de eux est bon ple del eux devant verdict, et e contra puis verdict, ou l'enquest tax un somme ingrosse pur damage del tous les biens et ne severa les damages.*" Brooke refers to Fitz. "Verdict," 13, and Fitz. to the Year Book, 1 Richard 3. 1, where the case is found at length. That case was heard before all the Judges. It was an action of detinue for several goods, which were collectively valued at one sum in the declaration and by the jury, and the question was, whether any judgment could be given on the verdict; the majority were of opinion that it could be given for the

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whole value; and if all the goods were not given up,—if one article was withheld, the defendant was liable for the value of all; the contention on the part of the defendant having been, that the different goods should have been valued separately, so that if one chattel only was withheld, the defendant would be liable for the value of that chattel only; and, according to the Year Book, this was generally thought right, though the majority of the Judges decided otherwise. In the course of the discussion, *Fairfax*, J., said that, in detinue for two things, the defendant might at first have given up one and pleaded as to the other, which seems to have been conceded, and so the inconvenience insisted upon on the other side might have been avoided, if it took place before verdict; after verdict it would be too late, for then there was a *duty* to pay the entire value of *all* if any one article were not delivered up. This is very clear and intelligible. If there is a good defence to part of the goods by reason that the defendant was always ready to deliver, the jury assess the value of the residue of the goods, and, we presume, damages also, but none as to the other goods delivered up. If there was no defence as to the part delivered up, then the jury would assess the value of the residue, and damages for the prior detention of the part delivered up.

In another case, however, a part of the goods was produced in Court and delivered to the plaintiff. The defendant had the benefit of the delivery, and no damages assessed against him; he was simply amerced; probably because the articles sought to be recovered were deeds, and no damage shewn by their having been detained. The case was in 38 Edw. 3, f. 3 b. It is stated that detinue was brought for deeds; some were produced, and the defendant pleaded non detinet as to the remainder. Those produced were delivered up to the plaintiff, and the defendant was amerced for the detainer; and in a subsequent case, 36 Hen. 6, f. 26 b, also of detinue of deeds, the

Court refused a prayer of damages for the detention of deeds, as to which the defendant said nothing, because the plaintiff had not been delayed, and they gave him judgment to recover the deeds only.

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It seems, therefore, that in detinue for goods, if all or any are delivered up after suit, the plaintiff can have no judgment to recover them or their value, for that would be *actum agere*; but he may have judgment to recover damages for their detention, if the plaintiff has sustained any; otherwise not: and for the residue, the plaintiff may have the usual judgment to recover them or their value, and damages for their detention. It seems to us, therefore, that the plea, as to the goods delivered up, is good, and the plaintiff ought not to have a judgment to recover what he has already got back.

The last plea is, a payment of money into Court on account of the damages for the detention. The 3 & 4 Will. 4, c. 42, s. 21, seems to us to apply to all actions, with the exceptions mentioned, of which detinue is not one. In every personal action, money may be paid into Court by way of compensation or amends; and this is a personal action, in which such compensation or amends is sought to be recovered, though the goods or their value is also sought to be recovered. The case is within the words and spirit of the Act; and we think this plea also is good.

Judgment for the defendant.

1852.

Nov. 16.

LAVERONI v. DRURY and Another.

The owner of a general ship is subject to the same responsibility for loss or damage of goods as a common carrier. Therefore, where, by the terms of a bill of lading containing the usual exceptions, the owner undertook absolutely to deliver goods shipped on board his vessel:—*Held*, that he was not excused by reason of the goods having been damaged by rats, notwithstanding he had kept cats on board, such damage not being within any of the exceptions in the bill of lading.

CASE.—The declaration stated, that the plaintiff, at the request of the defendants, caused to be delivered to the defendants divers goods and merchandise, to wit, thirty tubs of cheese of the plaintiff, of great value, &c., to be carried and conveyed by the defendants in a certain vessel of the defendants, called the “Anne Sophia,” from a certain place, to wit, Genoa, in Italy, to London, and then, to wit, at London, to be delivered to the plaintiff, for freight and reward to the defendants in that behalf; and the defendants then accepted and received the same accordingly, for the purpose aforesaid. Yet the defendants, not regarding their duty, &c., took so little and such bad care of the said goods, and in and about the stowage, carriage, and conveyance of the same, that, by reason of the negligence and improper conduct of the defendants in that behalf, a large part of the said goods became and were greatly injured and damaged, and of no use or value to the plaintiff.

Plea, (inter alia), not guilty.

At the trial, before *Martin*, B., at the first Middlesex Sittings in the present Term, it appeared that, in the month of December, 1851, the “Anne Sophia” was at Genoa, taking in cargo as a general ship, and the cheese in question was loaded on board, and three bills of lading signed by the master in respect of it. The bills of lading were in the Italian language, and all substantially in the same form; and by their terms, the master purported to bind himself absolutely to deliver the cheese safe and free from damage to the plaintiff in London. He was, however, examined at the trial, and stated that he was ignorant of the Italian language; and that, before he signed the bills of lading, they were read to him by the broker as if the ordinary exception contained in English bills of lad-

ing, viz. "the act of God, the Queen's enemies, fire, and all and every other danger and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, save risk of boats, so far as ships are liable thereto, excepted," was contained in and was part of them; and that he signed them under the belief and on the understanding that they were in the ordinary English form. The ship sailed, and arrived in London, but several of the cheeses (as was found by the jury) were eaten and damaged by rats in the course of the voyage. It was proved by the master that he had two cats on board; and it was insisted by the counsel for the defendants, that it was a question for the jury whether the defendants had not, by keeping the cats, excused or relieved themselves from the charge of negligence alleged against them. The learned Judge, however, was of opinion that this was not a question for the jury, and he directed them that damage by rats was not within the exception contained in the English bill of lading; and that if they believed that the cheese had been eaten and damaged by rats in the course of the voyage, the defendants were responsible to the plaintiff. The jury having found a verdict for the plaintiff, damages 36*l.* 18*s.*,

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Crowder moved for a rule nisi to set aside the verdict, and for a new trial, on the ground of misdirection (Nov. 8). —The proper question for the jury was, whether the master did all that a prudent man ought to have done to guard against injury from rats; and if so, the defendants are not liable for the damage, since the case would then fall within the exception as to "danger and accidents of the seas." The master of a ship is no doubt bound to take all possible care of the cargo; and where rats occasioned a leak in the vessel, whereby the goods were spoiled, the master was held responsible, notwithstanding the crew, by pumping, &c., did all they could to preserve the cargo from

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injury: *Dale v. Hall* (a). But the position invariably laid down by writers on foreign maritime law, and adopted in Abbott on Shipping (b), and Story on Bailments (c), is, that if the master has used all reasonable precaution to prevent loss from rats by having a cat on board, he is excused, as it would then be a loss by peril of the sea or inevitable accident. Thus Roccus de Navibus, note lviii., "Si mures merces oneratas in navi rodant, et proinde non leve damnum mercatoribus afferatur, magister navis tenetur mercatoribus damnum resarcire, quia ipse culpæ reus est. Tamen si nauta domesticas feles in navibus tenet, a dictâ culpâ est excusandus" (d). Again, in the Consulado de Mar (e), "Si quelques marchandises sont endommagées dans le navire par les rats faute de chat, le patron est tenu à des dédommagemens," &c. "Si un avoir est gâté par les rats, le seigneur du navire en doit le dédommagement; mais il n'est point déclaré (dans le précédent chapitre) ce qui devra resulter si les chats sont crevés dans le voyage. Les chats étant crevés, les rats endommageant la marchandise avant que le patron soit arrivé au lieu où il pouvoit s'en procurer; si arrivé, à ce lieu, il s'en procure, il ne sera point tenu à des dédommagemens, puisque les mer-

(a) 1 Wils. 281.

(b) Page 371, 8th edit.

(c) Section 513.

(d) In the American translation of Roccus by Joseph Reed Ingersoll, the editor observes, with reference to the above passage—"This doctrine is borrowed from a text in the Civil Law, which we insert, that the reader may judge of its application: 'If a fuller,' says the Digest, 'has received cloth to full, and the rats have gnawed and injured it, he is answerable for the damage, because he ought to have guarded

against it: Dig. lib. 19, tit. 2, law 13, s. 6.'"

(e) Cap lxvi. lxvii. ed Valencia, 1539. The above passage is cited from a work intitled "Consulat de la Mer, ou Pandectes du Droit Commercial et Maritime, Faisant loi en Espagne, en Italie, à Marseille, et en Angleterre, et consulté par tout ailleurs comme raison écrite; Traduit du Catalan en Français, d'après l'Edition originale de Barcelonne, de l'an 1494. Par P. B. Boucher—Paris, 1808, tom. 2, chap. lxvii. s. 127, lxviii. ss. 128, 129."

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chandises n'ont point été gâtées pas sa faute." Emerigon (a), after citing the above authority (b), observes, "Telle est la doctrine de tous nos auteurs: Casaregis, disc. 23, No. 73; Stracca de Navib. part. 3, No. 48, pag. 451; Roccus, ibid., not. 58; Santerna, part. 4, No. 31; Kuricke, tit. 3, art. 19, No. 1, pag. 723; Targa, cap. 28, not. 4, pag. 119; Cleirac sur le Guidon de la Mer, ch. 5, art. 8. Ces auteurs citent la loi 13, s. 6, *ff locati*, qui décide que, *si fullo vestimenta polienda acceperit, eaque mures roserint, ex locato tenetur, quia debuit ab hac re cavere* (c)." In Story on Bailments, sect. 513, reference is made to a case of *Garrigues v. Coxe* (d), in which the Supreme Court of Pennsylvania held, that a leak occasioned by rats, without the neglect of the captain, is a peril within the terms of a policy of insurance. The contrary, however, was ruled by Lord *Ellenborough* in the case of *Hunter v. Potts* (e).

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—This was an application for a new trial, made by Mr. *Crowder* on behalf of the defendants, on the ground of misdirection. The cause was tried before my Brother *Martin*, at the first Sittings in this Term, when a verdict was found for the plaintiffs. The declaration was

(a) *Traité des Assurances*, Chap. xii. sect. iv.

(b) The passage in Emerigon is as follows:—"P. S. Dans un procès pendant en notre amirauté, il est question de savoir si le capitaine est tenu des dommages causés par les rats. Voici quelle est la disposition du Consulat de la Mer, Ch. 65 et 66.

"Si la merchandise chargée dans le navire se trouve rongée par les rats, et qu'on n'ait pas eu la

précaution de mettre des chats à bord, le patron est tenu de céder le dommage. Le patron ne répond pas du dommage causé par les rats, si les chats qui étaient à bord sont morts pendant le voyage, pourvu qu'au premier endroit où il a touché, il n'ait rien oublié pour s'en procurer d'autres."

(c) See ante, p. 168, note (d).

(d) 1 Binny, Rep. 592.

(e) 4 Camp. 203.

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in the ordinary form, by the plaintiff (owner of goods) against the defendants (shipowners) for damage alleged to have occurred by the negligence of the defendants, owners of the ship "Anne Sophia," to Parmesan cheese, the property of the plaintiff, on a voyage from Genoa to London.

[His Lordship then stated the facts and ruling, as above set forth; and after observing that, "for the purpose of the present question, it was to be considered that the bills of lading were in the ordinary English form, for the direction complained of was founded upon the supposition that the exception above referred to was contained in the bills of lading, and that the plaintiff was bound by it," proceeded:]—We are of opinion that the direction of the learned Judge was right.

By the law of England, the master and owner of a general ship are common carriers for hire, and responsible as such. This, according to the well-known rule, renders them liable for every damage which occurs during the voyage, except that caused by the act of God or the Queen's enemies. They, however, almost universally receive goods under bills of lading signed by the master; and in such case the liability depends upon and is governed by the terms of the bill of lading, it being the express contract between the parties—the owner of the goods on the one hand, and the master and owner of the ship on the other.

The exception contained in the English bill of lading, which is to be assumed to be in the bills of lading in the present case, will be found in "Abbott on Shipping," p. 280, and is as follows:—"The act of God, the Queen's enemies, fire, and all and every other danger and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, save risk of boats, so far as ships are liable thereto, excepted." We agree with the learned Judge, that the true question is, whether damage by rats falls within the exception, and we are clearly of opinion that it does

not. The only part of the exception under which it possibly could be contended to fall is, as "a danger or accident of the sea and navigation;" but this we think includes only a danger or accident of the sea or navigation, properly so called, viz. one caused by the violence of the wind and waves (a vis major) acting upon a seaworthy and substantial ship, and does not cover damage by rats, which is a kind of destruction not peculiar to the sea or navigation, or arising directly from it, but one to which such a commodity as cheese is equally liable in a warehouse on land as in a ship at sea.

In moving for the rule, the learned counsel for the defendants cited various foreign writers of great eminence and authority: Emerigon, vol. 1, pp. 377, 378; Consulado de Mar, cc. 66, 67; Roccus, n. 58; Story on Bailments, s. 513. The foreign authorities first above mentioned lay down the rule distinctly, that a ship's master, who keeps cats, is excused from damage by rats. But, however eminent their authority, and however worthy of attention and consideration their works are, we cannot act upon them in contradiction to the plain and clear meaning of the words of the bill of lading, which is the contract between the parties. As to Mr. Justice Story, he very carefully confines himself to stating that such are the foreign authorities, and, as it seems to us, avoids expressing his own opinion upon the point. He cites a case in the Court of Pennsylvania, where damage by rats was held to be a peril of the sea; but he also refers to another case in Kent's Comm. vol. 3, p. 300, where the contrary is stated to be law.

It was strongly insisted, that the same doctrine was laid down by Lord *Tenterden* in his book on Shipping, p. 326; and there is no doubt that any opinion coming from him is entitled to the greatest weight and consideration. We do not, however, think that Lord *Tenterden* can be understood as laying down such a rule. He cites the passage

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from Roccus, which states that keeping cats on board excuses the ship-owner from damage by rats; but, immediately after, states that to be merely an illustration of the general principle, by which masters and owners are held responsible for every injury that might have been prevented by human foresight or care. Now, whatever might have been the case when Roccus wrote, we cannot but think that rats might be now banished from a ship by no very extraordinary degree of diligence on the part of the master; and we further are very strongly inclined to believe, that, in the present mode of stowing cargoes, cats would offer a very slight protection, if any, against rats. It is difficult to understand how in a full ship a cat could get at a rat in the hold at all, or at least with the slightest chance of catching it. But that Lord *Tenterden* cannot be understood as contended for by the learned counsel for the defendants in the present case, is evident from the authority which he cites for his view of the law: *Dale v. Hale(a)*. That was an action against a ship-master, who carried goods for hire. It was contended for the defendant at the trial, that the plaintiff had proved no negligence; and it was proposed to prove, that the defendant had taken all possible care of the goods, and that the damage accrued by rats having made a leak in the vessel, whereby water was admitted; and that thereupon every thing possible was done to pump out the water and prevent the damage which happened. The evidence was admitted, and the defendant obtained a verdict. A new trial was moved for on the ground that the evidence was not legally admissible, and the rule was made absolute. The Chief Justice stated, that the evidence ought not to have been received; that every thing was negligence in a carrier or hoyman that the law does not excuse; that he was answerable for goods the instant he received them,

(a) 1 Wils. 281.

and *in all events*, except they happened to be damaged by the act of God or the King's enemies. This is the case stated by Lord *Tenterden* in the part of his book above referred to, as one, indeed the principal, authority upon the subject, and we entirely concur in it; and it seems to us conclusive in the present case.

In our opinion, the application of the principle laid down in that case affords the only true rule of ascertaining with accuracy and certainty the liability of the master and owner of a general ship, viz. that *prima facie* he is a common carrier, but that his responsibility may be either enlarged or qualified by the terms of the bill of lading, if there be one; and that the question, whether the defendant is liable or not, is to be ascertained by the terms of this document, when it exists.

Rule refused.

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JACKSON v. BURNHAM and Wife, Administratrix, &c.

Nov. 25.

DEBT against the defendant and his wife, administratrix of one Beaumont, for meat, drink, lodging, &c., provided by the plaintiff for the intestate.

Plea, that, before the commencement of the suit, the plaintiff being a prisoner in actual custody within the walls of a certain prison, to wit, the Debtors Prison for London and Middlesex, upon process at the suit of one G. Lawrence, for the recovery of a certain debt then due from the now plaintiff to G. Lawrence, did, within fourteen days next after the commencement of the said actual custody of the now plaintiff, duly and according to the directions and provisions of the statute (1 & 2 Vict. c. 110), apply by petition in a summary way to the Court

An insolvent, who has taken the benefit of the 1 & 2 Vict. c. 110, may sue for a debt which accrued to him after the vesting order and before his final discharge, unless the provisional assignee interferes and claims the debt; therefore a plea of the plaintiff's insolvency is bad, unless it contains an express averment to that effect.

effect:—Per *Pollock*, C.B., *Alderson*, B., and *Platt*, B.; *Martin*, B., dubitante.

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for the relief of insolvent debtors for his discharge from such custody, according to the provisions of the said Act, in which petition the now plaintiff stated that he was willing that all his real and personal estate and effects should be vested in the official assignee for the time being of the estate and effects of insolvent debtors in England, according to the provisions of the said Act, and prayed to be discharged from custody, and to have future liberty of his person against the demands for which the now plaintiff was then in custody, and against the demands of all other persons who should be, or claim to be, creditors of the now plaintiff at the time of the presenting of the said petition, and which petition was then duly subscribed by the now plaintiff, and was forthwith filed of record in the said Court, pursuant to the directions in the said Act contained. That, on the filing of the said petition, the Court, in pursuance of and according to the statute, ordered that all the real and personal estate and effects of the now plaintiff, both within this realm and abroad, except the wearing apparel, bedding, and other such necessities of the plaintiff and his family, and the working tools and implements of the plaintiff, not exceeding in the whole the value of 20*l.*, and also all the future estate, right, title, interest, and trust of the now plaintiff, in or to any real or personal estate and effects within this realm or abroad, which the now plaintiff might purchase, or which might revert, descend, or be devised or bequeathed, or come to him, before he should be entitled to his final discharge in pursuance of the said Act, according to the adjudication made in that behalf, (or in case the now plaintiff should obtain his full discharge from custody without any adjudication being made by the said Court) then before the now plaintiff should be fully discharged from custody, and all debts due or growing due to the now plaintiff, or to be due to him before such discharge, should be vested in one S. Sturgis, then and still being

the provisional assignee of the estates and effects of insolvent debtors in England, his successors and assigns; which said order was then duly entered of record in the said court, and notice of the said order was duly published according to the directions of the said court. That afterwards, and before the commencement of this suit, the plaintiff became and was entitled to be finally discharged, and was, by an adjudication and order of the Insolvent Debtors Court in that behalf then duly made upon the said petition, in pursuance of the statute, then finally discharged from custody as such insolvent debtor. That the debt in the declaration mentioned, and every part thereof, was contracted, and the cause of action in respect thereof, and every part thereof, accrued due, after the order in this plea first mentioned, and before the plaintiff so became entitled to his final discharge and was discharged as aforesaid, and the said monies became and were payable before such final discharge; and thereupon, by virtue of the first-mentioned order and of the statute, the debt, money, and cause of action in the declaration mentioned, and all the right, title, and interest of the plaintiff of, in, or to the same, did then become, and were, and are vested in the said S. Sturgis, as such provisional assignee.—Verification.

Demurrer, and joinder therein (*a*).

Hawkins argued in support of the demurrer (Nov. 10th).—The plea is bad in substance. An insolvent has a right to sue for a debt which accrued to him after the vesting order, and before his final discharge, unless the provisional assignee interferes and claims the debt; and this plea contains no averment to that effect. By the 35th section of the 1 & 2 Vict. c. 110, any person imprisoned for debt

(*a*) The plaintiff demurred specially on several grounds, but the substantial ground only was argued, viz. that the plea was bad for not shewing that the provisional assignee interfered or claimed the debt.

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may apply by petition to the Court for the Relief of Insolvent Debtors for his discharge; and in such petition he is required to state, amongst other things, that he is willing that all his real and personal estate and effects shall vest in the provisional assignee for the time being. By section 37, upon the filing of such petition, the court is required to make an order, vesting in the provisional assignee all the real and personal estate and effects of the prisoner (with certain specified exceptions), and all his future estate, "and all debts due or growing due to such prisoner, or to be due to him before such final discharge," &c.; and such order, when so made, shall, without any conveyance or assignment, vest all the real and personal estate and effects of such prisoner, and all such future real and personal estate and effects as aforesaid, of every nature and kind whatsoever, and all such debts as aforesaid, in the said provisional assignee." The 42nd section enables the provisional assignee to sue in his own name, "*if the court shall so order*," for the recovery of any debts of the prisoner. It can scarcely be contended, that an insolvent cannot make a binding contract between the time of the vesting order and his final discharge; otherwise the provisional assignee could not claim the benefit of it. Then if the insolvent has power to contract, the court may in its discretion either order the assignee to sue in his own name, or allow the insolvent to sue as a trustee for his estate. *Ford v. Dabbs* (a) is no authority against the position contended for, since the only point there decided was, that a debt accruing to an insolvent between the time of the vesting order and his final discharge, vests in his assignee. *Herbert v. Sayer* (b) is an express authority that an uncertificated bankrupt may contract, for the benefit of his assignees, and sue on such contracts in his own name, unless the assignees interfere. The same principle applies to the Insolvent Act.

(a) 5 Man. & Gr. 309.

(b) 5 Q. B. 965.

Montague Smith, in support of the plea.—*Herbert v. Sayer* was decided on the language of the Bankrupt Act, 6 Geo. 4, c. 16, which materially differs from that of the Act in question. The 127th section of the 6 Geo. 4, c. 16, enacts, that the future estate and effects of a bankrupt, who has not paid 15s. in the pound under a second commission, shall vest in his assignees, “*who shall be entitled to seize the same, in like manner as they might have seized property of which such bankrupt was possessed at the issuing the commission.*” Therefore, unless the assignees interfere, the bankrupt has a right to sue on his contracts in his own name. But the 37th section of the 1 & 2 Vict. c. 110, declares, that the order of the Court shall vest absolutely in the provisional assignee all debts due or to be due to the insolvent; and the construction contended for by the other side would import to the section the words “provided the assignee interferes to claim them.” [*Platt, B.*, referred to the 63rd section of the 6 Geo. 4, c. 16.] *Young v. Rishworth* (a) is an authority that this plea affords a *prima facie* answer, and that, if the provisional assignee has permitted the insolvent to sue, that fact should have been replied.

Hawkins, in reply, urged that *Young v. Rishworth* was overruled by *Herbert v. Sayer*.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—In this case the declaration was for meat, drink, &c., furnished by the plaintiff to the intestate in his lifetime. There was a plea, that before action the plaintiff, being a prisoner, duly petitioned the Insolvent Court; that the court made an order vesting the plain-

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(a) 8 A. & E. 470.

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tiff's real and personal estate and all *future effects, before his discharge*, in one Samuel Sturgis, the provisional assignee. The plea then alleged that the debt to which the plea applied accrued after the order and before the discharge. To this plea there was a demurrer, on the ground that it was not alleged that the provisional assignee had interfered or claimed the debt.

The case was argued before us on the 10th of November last; and the question which we have to decide is, substantially,—*whether an insolvent can sue for a debt arising after the vesting order and before his final discharge, if the provisional assignee does not interfere to claim the debt.* The terms of the statute, 1 & 2 Vict. c. 110, s. 37, are no doubt very strong and clear. [His Lordship read the section.] They establish the right of the provisional assignee as against the insolvent and every other person; but the question is,—*whether the defendants can set up this "jus tertii," without any interference by, or authority from, the provisional assignee, the third party.*

There has not been any decision upon this point with reference to the Insolvent Debtors Act; the case of *Ford v. Dabbs* (a) was cited, but it does not dispose of the question before us. The Court decided in that case, that debts accruing before the discharge vest in the provisional assignee, as no doubt they do; but the precise question before us did not arise. There is however a recent decision in a Court of error upon a similar enactment in the Bankrupt Law, by which we are of opinion that we are bound; the case is *Herbert v. Sayer* (b). The seventh plea in that case was, that the plaintiff had been twice a bankrupt, and had not paid 15s. in the pound under the second commission, and therefore the debt in question belonged to the assignees. To this there was a special demurrer, assigning for cause that it did not appear that the assignees had

(a) 5 Man. & Gr. 309.

(b) 10 Q. B. 965.

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interfered. On the argument in the Queen's Bench, that Court gave judgment for the defendant on the seventh plea. This judgment was reviewed in the Court of Exchequer Chamber; and after taking time to consider, that Court reversed the judgment of the Court of Queen's Bench, and gave judgment for the plaintiff on the seventh plea. The statute on which the question depended was the 6 Geo. 4, c. 16, ss. 63, 127. In the 63rd section it is expressly enacted, not only that the property shall vest in the assignees, but that neither the bankrupt nor any one claiming under him *shall have power to recover the debts &c.*; yet the Court held that the bankrupt had a good right to sue except as against his assignees; and as the plea did not allege their interference, it did not contain a complete defence. All the previous cases were adverted to in the judgment, which is binding on us as the decision of a Court of error, and is entitled to great respect as a very elaborate and deliberate judgment. It is contended that the words in the Insolvent Act are not precisely the same as those of this Act of Parliament. In the first place, we think the words in the Bankrupt Act are quite as strong as, if not stronger than, those of the Insolvent Act; but even if this were not so, we think it very unadvisable, in considering the construction of statutes like these, which relate to similar matters, to draw fine and minute distinctions, rendering it very difficult for suitors to know by what rule such cases are governed. We think, therefore, the same construction ought to be put upon similar provisions in insolvency and in bankruptcy, and in bankruptcy it is (quoad us sitting here in this Court) *res judicata*.

We think, therefore, our judgment ought to be for the plaintiff. We have given as the foundation of our judgment the authority of a decision by a superior Court; but we would add, that the doctrine is by no means new, that the express words of a statute may be controlled and

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confined to the mischief contemplated by the Act: see Mr. Justice *Holroyd's* judgment in *Edwards v. Dick* (a), where it was held that, although the statute 9 Anne, c. 14, s. 1, makes bills of exchange given for money won at play utterly void, frustrate, and of none effect, to all intents and purposes whatsoever, any law &c. to the contrary in anywise notwithstanding, an indorsee of such a bill was held entitled to recover against the drawer (the winner) who had procured the acceptance from the loser; and Mr. Justice *Holroyd* referred to the case of ecclesiastical leases under the 13 Eliz. c. 10, s. 3, which, although declared to be utterly void &c., to all intents &c., were held good between the parties; the object of the statute being to prevent injury to the successors. The judgment, therefore, will be for the plaintiff (b).

Judgment for the plaintiff.

(a) 4 B. & Ald. 212.

(b) His Lordship said—"I should however add, that my Brother *Martin*, who heard the case argued along with my Brothers *Alderson*, *Platt*, and myself, entertains some doubt whether, although there be a decision on the Bankrupt Act, we are not bound by the express language of the Act in question, upon which there has been no positive decision, to administer

the law in the same way as we should if we merely looked at the language of that statute. Entertaining that doubt, I am not authorised in saying that this is also the judgment of my Brother *Martin*; he did not however think it necessary to differ from us by giving a separate judgment, but merely requested me to state that he entertained the doubt to which I have adverted."

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THE DUBLIN AND WICKLOW RAILWAY COMPANY *v.* BLACK.

Nov. 10.

DEBT.—The first count of the declaration stated, that the defendant is the holder of fifteen shares in the Dublin and Wicklow Railway Company, and is indebted to the plaintiffs in 7*l.* 10*s.* in respect of a call of 10*s.* upon each of the said shares; whereby an action hath accrued to the said Company by virtue of the Companies Clauses Consolidation Act, 1845, of the Waterford, Wexford, Wicklow and Dublin Railway Act, 1846, and of the Dublin and Wicklow Railway Act, 1851. There was a similar count for 45*l.* in respect of two calls of 1*l.* and 2*l.* upon each of the shares.—Breach, non-payment.

A plea of infancy, to an action for railway calls, should allege that the infant repudiated the contract within a reasonable time after he became of full age.

Quære, whether the plea ought to allege that the infant repudiated before the calls became due.

Plea.—That, before the making of the several calls, and before the plaintiffs were incorporated, to wit, on &c., the defendant contracted with certain persons, the number and respective names of whom are to the defendant unknown, but who were then promoting the incorporation of the plaintiffs, to take the said shares, and then subscribed to the capital of the then intended corporation of the plaintiffs to the amount of the said shares; and that he became and was the holder of the said shares, by reason and in consequence of his having so contracted for the said shares, and so subscribed, and not otherwise; and that, at the time of his so contracting and subscribing for the said shares, the defendant was an infant within the age of twenty-one years, to wit, of the age of nineteen years. That, after the defendant had so contracted and subscribed for the said shares, and after the defendant had become and was of the full age of twenty-one years, and before the commencement of this suit, to wit, on &c., the defendant disaffirmed and repudiated his said contract and subscription; of which said disaffirmance and repudiation the plaintiffs then and before the commencement of

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this suit, to wit, on &c., had due notice. That the defendant never, after he attained his full age of twenty-one years, and before he so disaffirmed and repudiated as aforesaid, did ratify or affirm the said contract or the said subscription, or derive any benefit from the said shares, or any or either of them, or exercise any authority over them or any or either of them, or have any possession of any certificate or other instrument of title relating to them or to any or either of them, or do any act or otherwise demean himself as the holder of the said shares or any or either of them. That he the defendant cannot ascertain, nor could he at any time since the commencement of this suit have ascertained, the names of the persons with whom he so contracted as aforesaid, or any or either of them, without being put to costs and damages.—Verification.

Special demurrer, assigning for causes, that it is not expressed in the plea that the defendant disaffirmed and repudiated his contract and subscription, either before he became of age or within a reasonable time after; and that it does not appear from the plea that the defendant did not disaffirm and repudiate his contract and subscription after the calls became payable.—Joinder in demurrer.

Phipson, in support of the demurrer.—In the case of *The Cork and Bandon Railway Company v. Cazenove* (a), the Court of Queen's Bench considered that infant shareholders were under a statutory liability to pay railway calls. That doctrine was qualified in the case of *The North Western Railway Company v. M'Michael* (b), where this Court decided, on the authority of *Ketley's case* (c) and *Evelyn v. Chichester* (d), that an infant might repudiate

(a) 10 Q. B. 935.

(b) 5 Exch. 114.

(c) *Brown*, 120; as *Ketsey's case*, Cro. Jac. 320; as *Kirton v.*

Elliott, 2 Bulst. 69; as *Kettle v. Elliott*, Roll. Abr. 731.

(d) 3 Burr. 1717.

the contract, and so get rid of his liability. But, assuming that this is a contract voidable at the election of the infant, if he does not repudiate it during infancy, he ought to do so at full age or within a reasonable time after. In *Holmes v. Blogg* (a), *Dallas*, C. J., says, "I agree that, in every instance of a contract voidable only by an infant on coming of age, the infant is bound to give notice of disaffirmance of such contract in reasonable time." This plea merely alleges that the defendant repudiated after he became of full age; and consistently with that allegation the repudiation may have taken place some years after his majority. By not repudiating within a reasonable time, he prevents the Company from allotting the shares to other persons. A further objection to the plea is, that it contains no allegation that the repudiation was before the time when the calls were due.

J. Addison, in support of the demurrer.—This is not a contract for shares in an existing Company, but in a Company intended to be formed; and therefore the case is not analogous to that of a lease, but resembles an agreement for a lease, which is clearly void as against an infant. Where a contract by an infant is not merely voidable but absolutely void, the general plea of infancy is a good bar. But assuming that it would not suffice here, this plea discloses a sufficient repudiation of the contract. It is averred that the defendant disaffirmed and repudiated his contract, of which disaffirmance and repudiation the plaintiffs had notice. A similar allegation was held a sufficient *prima facie* answer in the case of *The Newry and Enniskillen Railway Company v. Coombe* (b). It is alleged that the defendant never derived any benefit from, or exercised any dominion over, the shares, so that no intendment of benefit can arise. In the case of *The North West-*

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(a) 8 Taunt. 35; S. C., 1 B. Moo. 466.

(b) 3 Exch. 565.

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ern Railway Company v. M'Michael(a), the defendant took an absolute interest in the shares by virtue of his contract, and the plea contained no averment of repudiation. In the case of *The Cork and Bandon Railway Company v. Cazenove*(b), non-repudiation was considered equivalent to ratification at full age. So in *Ketley's case* it was held that, if an infant lessee continues in possession of the land after he is of age, that is a ratification of the contract, and renders him liable for the arrears of rent. The principle of those authorities is, that the infant impliedly affirms by not disaffirming within a reasonable time after he is of age; but here there is an express averment that the defendant never ratified the contract. Whether the repudiation was within a reasonable time, is matter of evidence upon the question of fact whether there was a valid repudiation. There is no authority that an infant may not repudiate even after the call is due. This Court, in their judgment in the case of *The North Western Railway Company v. M'Michael*, express an opinion that the liability would cease, though the avoidance might not have taken place till the call was due.

PER CURIAM(c).—We are all of opinion that the plea is bad, for not alleging that the defendant repudiated within a reasonable time after he became of age. The defendant may have liberty to amend, otherwise judgment for the plaintiffs(d).

(a) 5 Exch. 114.

(b) 10 Q. B. 935.

(c) *Pollock, C. B., Alderson, B.,*

Platt, B., and Martin, B.

(d) No amendment was made, and the plaintiffs had judgment.

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COPE and Another v. ALBINSON.

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THE declaration stated that, at the time of the making of the promise, &c., John Albinson the younger, (being the same J. Albinson the younger mentioned in the instrument in writing hereinafter set forth), was indebted to the plaintiffs in the sum of 663*l*. 9*s*. 8*d*.; and, being so indebted, one A. Varley (being the same person as the A. Varley in the instrument in writing hereinafter mentioned), for and on behalf of and as the agent of the defendant, and then being thereunto lawfully authorised in that behalf by the defendant, by the said instrument in writing signed by A. Varley, then being such agent, and addressed to the plaintiffs, promised the plaintiffs in the words and figures following (that is to say):—"Messrs. Cope & Miller: Without prejudice to any proceedings you may think proper to take, Mr. Albinson of this town, land surveyor (meaning the defendant), offers to pay a composition of seven shillings in the pound on your account against his nephew John Albinson the younger, and on your giving proper indemnification to both. In the event of your accepting the offer, I will thank you to forward me full particulars of your account, in order that the same may be properly examined.—A. VARLEY." Averment, that the plaintiffs accepted the said offer of the defendant, and thereupon then forwarded the full particulars of their account to A. Varley, as and so being such agent, and pursuant to the terms in the instrument in writing in that behalf mentioned. And, although the plaintiffs have always been ready and willing, and on &c., offered to give a proper indemnification in that behalf to both J. Albinson the younger and the defendant, of which they

A declaration stated that, J. being indebted to the plaintiff in a certain sum, the defendant, by his agent, wrote to the plaintiff as follows:—"Without prejudice to any proceedings you may think proper to take, Mr. A. (the defendant) offers to pay a composition of 7*s*. in the pound on your account against his nephew J., on your giving proper indemnification to both. In the event of your accepting the offer, I will thank you to forward me the full particulars of your account, in order that the same may be properly examined." Averment, that the plaintiff accepted the offer, and thereupon forwarded full particulars of his account; and, although the plaintiff has always been ready and willing, and offered, to give a proper indemnification, yet the defendant has not paid

the composition:—*Held* bad on general demurrer, as not shewing any binding contract, but a mere offer to pay.

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then respectively had notice, and although a reasonable time for the payment of the said composition had elapsed before the commencement of this suit, yet the defendant hath not paid the same.

Demurrer(a), and joinder therein.

Cowling, in support of the demurrer.—The declaration is bad in substance. There was no complete agreement on the part of the defendant to pay the composition, but a mere proposal. It does not appear that the defendant knew the amount of the plaintiffs' claim. The letter uses the word "offer," not "promise." [*Parke*, B.—The defendant offers to pay upon a proper indemnification being given to both; and there is no averment that such indemnification has been given.]

The Court then called on

Milward to support the declaration.—There is a sufficient binding agreement. The payment of the composition and the giving of the indemnification are to be contemporaneous acts. If the construction of the other side be correct, the indemnity must be given before the money is paid. [*Parke*, B.—This is an agreement for a composition upon terms thereafter to be settled, and is like a contract for the purchase of an estate for such a sum as the parties may think fair.] *Traver v. —*—(b) is an authority that an action may be maintained on a promise to pay so much as the plaintiff shall prove to be due, although no proof has been made before action brought. [*Parke*, B.—Here the word "offer" is used in its proper sense; and the defendant is not bound to pay unless the plaintiff gives the indemnity. *Alderson*, B.—The meaning is this:

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| (a) The defendant demurred specially on several grounds, but the substantial objection alone | was argued. (b) Sid. 57. |
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"I offer to pay you a composition, upon the account being examined and settled, and upon receiving a sufficient indemnity."]

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PER CURIAM (a).—There must be judgment for the defendant.

Judgment for the defendant.

(a) *Pollock, C. B., Parks, B., Alderson, B., and Platt, B.*

HENNING v. BURNET.

Nov. 17.

TRESPASS for breaking and entering a close of the plaintiff, situate in the parish of Radipole, in the county of Dorset, and with feet in walking, and with cattle and carriages, trampling upon and spoiling the soil, &c.

The defendant pleaded (inter alia) fourthly:—That before the said time when, &c., the plaintiff was seised in his demesne as of fee of and in the close in the declaration mentioned, and thereupon, by an indenture made the 11th of July, 1849, between the plaintiff of the first part, the defendant of the second part, and one Bartholomew Burnet of the third part (after reciting indentures of lease and release, dated the 19th and 20th of April, 1831, whereby a piece of land, situate at Radipole, was conveyed to such uses as the plaintiff should by deed appoint), the plaintiff did, for the consideration therein mentioned, appoint parcel of the said piece of land, together with the

The plaintiff, being the owner in fee of some land, partly built upon, conveyed to the defendant a dwelling-house, with a coach-house and stable at the back thereof, and a field, together with all ways, waters, easements, &c., to the dwelling-house and field belonging, or usually enjoyed therewith, with free liberty of ingress, egress, and regress, for the defendant, with cattle and

carriages, over the carriage-road and foot-path leading to the said dwelling-houses, coach-houses, and stables, in the occupation of F. N. and the defendant. Previous to the time of this conveyance, a private road was used for carriages, cattle, &c., from the turnpike-road to the defendant's coach-house and stable, and field, from which road there was a gate into the field. The defendant afterwards pulled down his coach house and stable, and built a wall across the private road, near their former site, (inclosing a portion of the road which had been conveyed to him in fee), and he also opened a gate at the further corner of his field into the private carriage-road, which he used instead of the former gate, and drove cattle and carriages along the road into the field and back again:—*Held*, that the defendant was liable in trespass, inasmuch as the grant of all ways to the field belonging or usually enjoyed therewith, extended only to the user of the way as it existed at the time of the grant through the then existing gate, and the express grant was of a right of way to the dwelling-house, coach-house, and stable only.

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messuages, coach-houses, and stables erected thereon, to (amongst other uses) the use of the defendant, his heirs and assigns for ever; "And the plaintiff did thereby grant unto the defendant and his heirs, free liberty of ingress, egress, and regress unto the defendant, his heirs, &c., and his and their servants, with cattle, carts, and other carriages, in, over, and upon the carriage-road, and for the defendant, his heirs, &c., over and upon the footpath leading to the messuages, coach-houses, and stables, in the several occupations of W.S. Ferris, O. Newenham, and the defendant, in common with the plaintiff, his heirs, and his and their servants." The plea then averred that, by virtue of the indenture and of the statute of uses, the defendant became seised in fee of the said piece of land, messuages, &c., and entitled to the said liberty of ingress, egress, and regress, &c.; that the carriage-road and footpath in, over, and upon which such liberty was granted, were the close of the plaintiff in the declaration mentioned, and in which, &c., and that the defendant, having occasion to use the carriage road and footpath, did then pass and repass on foot, and with cattle and carriages, &c., quæ sunt eadem.—Verification.

The fifth plea, after stating, as above, the appointment by the plaintiff of the said piece of land to the defendant in fee, proceeded:—"And the plaintiff did thereby grant unto the defendant, his heirs, &c., all ways, waters, easements, advantages, &c., to the said piece or parcel of land belonging or in anywise appertaining or usually held, occupied, or enjoyed therewith." The plea then averred, that the defendant became seised in fee of the said piece of land so appointed, and "entitled to use all ways, easements, and advantages whatsoever therewith usually occupied and enjoyed;" that the occupiers for the time being of the said piece of land "have been used to have and enjoy a certain way, to wit, from a certain public highway in the county aforesaid, and also through, over,

and along the close in the declaration mentioned, and in which, &c., towards, unto, and into the said piece of land so appointed to the defendant, and so back again, &c., to go, return, pass, and repass, on foot and with horses, &c., at all times of the year, at their free will and pleasure;" that the defendant, being so seised of the said piece of land, and entitled to such way, at the said time when, &c., did pass and repass on foot, and with cattle and carriages, &c., from the last-mentioned public highway, into, through, over, and along the close in which, &c., unto and into the said piece of land, and so back again, &c.; *quæ sunt eadem*.—Verification.

The plaintiff, to the fourth plea, new assigned that the defendant, with feet in walking, and with the feet of cattle, &c., trod down and damaged the said close upon other and different occasions than when the defendant had occasion to use the said way as in the fourth plea mentioned, and for other and different purposes than for the use thereof.

The plaintiff replied to the fifth plea, by traversing that occupiers of the said piece of land had been used to have and enjoy the way therein alleged, concluding to the country. He also new assigned in terms similar to the new assignment to the fourth plea.

The defendant joined issue on the replication to the fifth plea, and pleaded not guilty to the new assignments.

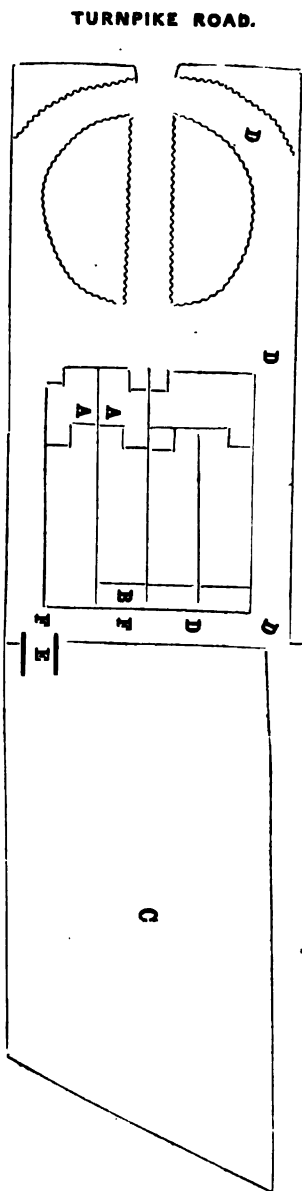
At the trial, before *Platt*, B., at the last Dorsetshire Assizes, the following facts appeared:—The plaintiff, being the owner in fee of some land at Radipole, in Dorsetshire, a portion of which was built upon, by indenture of the 11th of July, 1849, sold and conveyed to the defendant two dwelling-houses A (which the defendant afterwards converted into one), together with the coach-house and stable at the back thereof, B, and a field C, "together with all houses, outhouses, edifices, buildings, ways, waters, watercourses, trees, woods, underwoods, hedges, ditches, fences, profits, pri-

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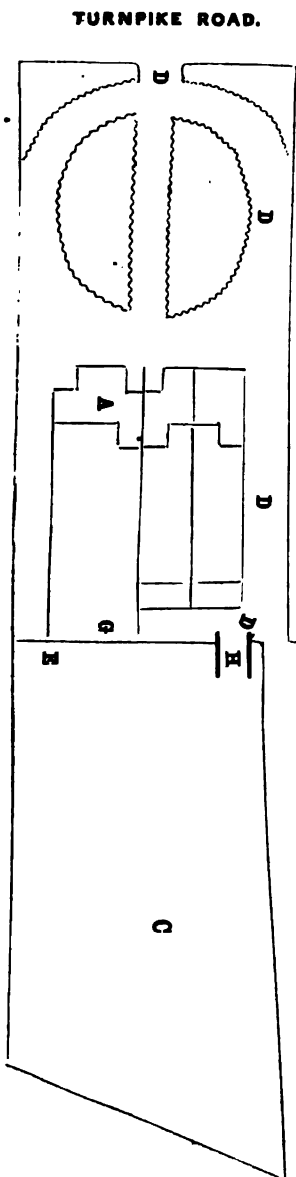
vileges, easements, advantages, rights, commodities, emoluments, and appurtenances whatsoever, to the said piece or parcel of land, messuages or dwelling-houses, coach-house, stable, and hereditaments, or any part or parts thereof belonging or in anywise appertaining, or usually held, occupied, or enjoyed therewith, together with free liberty of ingress, egress, and regress, unto the said C. Burnet (the defendant), his heirs, appointees, and assigns, and his and their friends, servants, and workmen, with cattle, carts, and other carriages, in, over, and upon the carriage-road, and for the said C. Burnet, his heirs, appointees, and assigns, friends and servants, over and upon the foot-path, both coloured red in the said plan (drawn on the conveyance) leading to the messuages or dwelling-houses, coach-houses and stables, in the several occupations of W. S. Ferris, O. Newenham, and the said C. Burnet, in common with the said J. Henning (the plaintiff), his heirs and assigns, and his and their tenants." Previous to and at the time of this conveyance, a private road D D D (see Plan 1) was used for carriages, cattle, &c., from the turnpike road to the coach-house and stable B, and to the field C, purchased by the defendant, which field was entered at a gate E. The site of a part of this road F F, lying at the back of the defendant's houses, was also conveyed in fee by the said deed. The defendant afterwards pulled down his coach-house and stable B, and built a wall G (see Plan 2) across the road, near their former site. He then opened a gate from his field C, at the point H, into the road D D D, which he used instead of the former gate. The action was brought in respect of trespasses committed by cattle and carriages passing backward and forward along the private road D D D, through the gate H into the field C. The defendant contended, first, that under the terms of the conveyance and grant to him, set out in the fourth plea, he was entitled to open a gate from his field at the point H, and to cause cattle and car-

PLAN (1) OF ANTWERP TERRACE HOUSES PREVIOUS TO AND AT THE TIME OF THE SALE TO THE DEFENDANT.



EXCH.

PLAN (2) OF PREMISES AS ALTERED BY DEFENDANT.



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riages to pass backwards and forwards through that gate into the private road D D D; secondly, that he was entitled to use that road as a road which had been used by the occupiers of the field C under the terms of the deed granting him "all ways usually held, occupied, or enjoyed therewith," as mentioned in the fifth plea.

The jury, under the direction of the learned Judge, found a verdict for the plaintiff on all the issues, except those on the fourth and fifth pleas and on the new assignments, leave being reserved for the plaintiff to move to enter a verdict for him on those issues and on the new assignment.

Crowder having obtained a rule nisi accordingly,

Slade and *Taprell* shewed cause.—The defendant was justified in opening the new gateway from his field, in order to get into the private carriage road. The general terms of the grant entitled the defendant to use that road as a means of access to his field, whether the coach-house and stable were pulled down or remained. *Allan v. Gomme* (a) will be relied on by the other side; but that was the case of a reservation and not of a grant of a right of way. [*Parke*, B.—In *Allan v. Gomme* a more strict rule was laid down than I should have been disposed to adopt; for it was said that the defendant was confined to the use of the way to a place which should be in the same predicament as it was at the time of the making of the deed. No doubt, if a right of way be granted for the purpose of being used as a way to a cottage, and the cottage is changed into a tan-yard, the right of way ceases; but if there is a general grant of all ways to a cottage, the right is not lost by reason of the cottage being altered.] In *Allan v. Gomme*, the right of way was to a place specifically mentioned; here the words "leading to" are merely

(a) 11 A. & E. 759.

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descriptive of the locality of the way, and not intended to define the terminus. [*Parke, B.*—Suppose a person grants a right of way over his land from a carriage-road to the dwelling-house of the grantee, the latter would have no right to open a way into his field so as to drive cattle to and from the field over the grantor's land, for that would impose a very different servitude. You would read this as a grant of a way over the carriage-road to every part of the field, instead of its being a way to the dwelling-house and stable only.] If it be so limited, the right would cease if all the buildings were pulled down. The case of prescription affords some analogy. If a man prescribe to a thing which is totally destroyed, the prescription is gone: Com. Dig. "Prescription" (G.) [*Parke, B.*—The defendant would still be entitled to go to the spot where the buildings formerly stood. *Alderson, B.*—Suppose a grant of way to a particular corner of a field; no doubt the grantee could go to no other part. Then, if there is a user as to a particular corner, the user must be construed in the same way as the grant.] Further, the defendant is entitled to use the way in the manner complained of by virtue of the grant of "all ways usually held, occupied, or enjoyed" with the dwelling-house. [*Alderson, B.*—How can it be a way "usually enjoyed therewith," when it was not in existence until the defendant made it?—They also cited *Saunders v. Newham* (a).

Crowder and *Hodges* appeared to support the rule, but were not called upon.

POLLOCK, C. B.—The rule must be absolute. The grant was of a way to the dwelling-house, coach-house, and stable only, and not to the field; and there is no evidence of a user of any other way.

(a) 1 B. & Ald. 258.

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PARKE, B.—One ground upon which it is sought to justify the trespass is, that by the terms of the grant there was a right of way over the private road to every part of the field. If the defendant cannot establish that, he is not entitled to succeed. The case of *Allan v. Gomme*(a) would probably authorise us to make this rule absolute. I confess, however, that I do not concur to the full extent of the doctrine there laid down, although that decision may be supported by the context, because it was a reservation of a right of way to that space only, which was then used as a woodhouse, and was not like the case of a general grant of a way to Greenacre, which would mean for whatever purpose the field was used, unless limited by the context. Here the right was to go to the dwelling-house, coach-house, and stable, and that does not justify the defendant in going to the field. Then it is argued, that there was an implied grant of this way, by reason of the grant of all ways enjoyed with the dwelling-house and field at the time of the conveyance. Now the way then used was to pass the defendant's land at the end, and go from thence into the field. That does not authorise the defendant to go any way except through the old gateway.

ALDERSON, B., and PLATT, B., concurred.

Rule absolute.

(a) 11 A. & E. 759.

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Ex parte STORY.

Nov. 16.

THIS was a motion for a rule to shew cause why a writ should not issue, directed to the Lord Bishop of London, the Judge, and the other officers of the Consistorial Court, and to Elizabeth Story, the party promoting the cause of *Story v. Story*, prohibiting them from further proceeding in the above cause, or prohibiting them from further proceeding in the matter of two monitions, alleged to be decreed on or about the 9th day of June, 1852, in the said cause.

It appeared by the affidavits in support of the motion, that, on the 1st of August, 1850, Story had been cited to appear before the Judge of the Consistorial Court of the Bishop of London, to answer in a suit of *Story v. Story*, brought against him by his wife Elizabeth, for restitution of conjugal rights. Mr. Story duly appeared, and objected (*inter alia*) to the jurisdiction of the Court. On the 26th of April, he received the following notice from his wife's proctor:—

“Doctors Commons, April 26th, 1852.

“I beg to give you notice, that, on the next Court day, the 30th instant, I intend to move the Judge to make his order upon you, to take your wife home and treat her with conjugal affection, and to certify that you have done so by the following Court day. I shall also move the Judge to pronounce you in contempt, for not having obeyed the two monitions served on you for the alimony now due to Mrs. Story, that the same may be signified.” Yours, &c.,

E. CRICKETT.”

Story accordingly appeared before the Judge, when

Where a Court has jurisdiction over a suit, mere irregularities in the proceedings in the suit do not afford any ground for a prohibition.

In August, 1850, a party was cited to appear in the Consistorial Court to answer in a suit instituted against him by his wife for restitution of conjugal rights. He duly appeared, and was heard. After some further proceedings in the suit, on the 9th of June, 1851, two decrees, ordering him to receive his wife, and to pay alimony, were made in his absence, and without any previous notice thereof to him. On the 2nd of September he received notice of the decrees, and also that, if he did not obey them, he would be held in contempt:—

Held, that the want of notice of the decrees, even if required

by the practice of the Ecclesiastical Court, did not afford any ground for a prohibition; but that the party's remedy was either by application to the Court itself, or by appeal.

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a motion was made on Mrs. Story's behalf, to pronounce the defendant in contempt for non-payment of alimony. Mr. Story, after calling upon the plaintiff's counsel to make the motion in accordance with the terms of the notice, and upon his refusing so to do, applied to the Judge to dismiss the suit; but the learned Judge would not grant the application.

On the 10th of May, Mr. Story received the following notice from his wife's proctor.

Story v. Story.

Sir,—“We beg to give yon notice, that we shall to-morrow, Tuesday, move the Court to pronounce you in contempt for not having obeyed the monitions served upon you for the payment of the alimony due to Mrs. Story, and to decree your contempt to be signified according to the Act of Parliament.”

Upon the day mentioned, Mr. Story appeared before the Judge, and paid the amount of the alimony demanded, under protest. On the 2nd of September, Mr. Story was served with copies of two monitions, both dated the 25th of June previously.

The first monition was as follows:—“Charles James, by Divine permission, Bishop of London, to all and singular clerks, &c., greeting: whereas the Right Honourable Stephen Lushington, Doctor of Laws, our Vicar General and Official Principal of our Consistorial and Episcopal Court of London, rightly and duly proceeding in a certain cause or business of restitution of conjugal rights, between Elizabeth Story (wife of William Story), the party promoting the same, on the one part, and the said William Story, her lawful husband, of &c., &c., in the Diocese of London, the party against whom the same is promoted, on the other part, at the petition of the proctor of the said Elizabeth Story, in pain of the contumacy of the said William Story,

thrice called and in nowise appearing, hath decreed the said William Story to be monished and cited in manner and form and to the effect hereinafter mentioned (justice so requiring); we do, therefore, hereby authorise, empower, and strictly injoin and command you jointly and severally, peremptorily to monish and cite the said William Story, by shewing to him a true copy hereof; whom we do also, by the powers of these presents, so monish and cite, that he do receive his wife, the said Elizabeth Story, home, and treat her with conjugal kindness, and certify his having done so to our Vicar General and Official Principal aforesaid, his surrogate, or some other competent Judge on this behalf, on the 15th day after the service of these presents, as aforesaid, if it be a general service by-day, extra, or additional Court-day of our said Court, then next ensuing, under pain of the law, and contempt thereof; and what you shall do, or cause to be done, in the premises, you shall duly certify to our Vicar General and Official Principal aforesaid, his surrogate, or some other competent Judge in this behalf, together with these presents. Dated at London, this 25th day of June, A.D., 1852, and in the 24th year of our translation.

JOHN SHEPARD, Deputy Registrar."

The second monition, after reciting that the Judge of the Consistorial Court, on the 13th of February, 1851, did allot to the said Elizabeth Story, 50*l.* per annum, as alimony pending suit, to commence from the return of the citation, and to be paid quarterly; and after reciting, that, on the 9th of June, at the petition of the proctor of the said Elizabeth Story, alleging that one quarter of the said alimony, amounting to 12*l.* 10*s.*, had, on the 4th of that month, become due and payable to her, a decree was made, that William Story should be monished and cited, proceeded to state, that he was thereby monished and cited to pay that sum to her or her proctor, within fifteen

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days after service of the monition, under pain of contempt. It was deposed by Mr. Story, that the monitions, alleged to be decreed the 9th of June, made, and so served as aforesaid upon him upon the 2nd of September, "were made and decreed in his absence, and without any previous notice, citation, or summons to him; and that he was entirely ignorant that any such decree or monition was about to be or was made against him, until served with the notice of the 2nd of September."

On the 4th of the present month, Mr. Story received a notice from his wife's proctor, that, unless he obeyed the monitions by taking his wife home, and treating her with conjugal affection, and certifying that he had done so the next Court day, and also by paying the alimony and costs set forth in the monition, on or before the 8th, he should, on the next Court day, the 9th, move the Court to pronounce him (Mr. Story) in contempt. Mr. Story did, in pursuance of this notice, attend the Court; and, on the motion being made, he objected to the matter proceeding further, on the ground that he had not received any notice of the decree made on the 9th of June. The judge intimated, that he would not then pronounce Mr. Story in contempt, but that he would allow him till the next Court day (the 17th of November) to comply with the orders of the Court; and that, if he had not then done so, he should pronounce him in contempt. [A similar application to the present was made on the 12th of this month, to the Court of Common Pleas, but that Court refused to grant a rule.]

J. H. Parry, in support of the motion.—The decree of the 9th of June, pronounced against Mr. Story, was made in his absence, and without his having received any previous notice of it; and this application to prohibit all further proceeding in the matter, is rested upon the ground that a proceeding in the nature of a judgment has been

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pronounced against a party without affording him the right of being heard in opposition to it, and therefore, that the proceedings are altogether void, as being contrary to natural justice, and to the plain principles of the law of the land. [*Alderson*, B.—The ecclesiastical Court had jurisdiction over the subject matter of the suit, and we cannot assume that it has acted in this instance without jurisdiction. Every Court must necessarily be entrusted with the control over its own rules of practice. If that were not so, the proceedings in the Courts would be continually subject to be stayed by prohibitions, supported by the rash oaths of the suitors. Suppose we were to make this rule absolute, and the Court of Queen's Bench were to grant a prohibition, to prohibit this Court, on the ground that the party against whom this rule had been obtained had not received notice, there would be no limit to such proceedings. The Court of Queen's Bench could not grant a prohibition to restrain this Court from proceeding on a judgment, on the ground that the applicant had not been served with a notice of declaration. A mere irregularity in the practice of a Court does not take away its jurisdiction. *Parke*, B.—In *Ex parte Smyth*(a), the decision proceeded upon the principle expounded in the *Marshalsea case* (b), that the temporal Courts do not interfere by way of prohibiting proceedings in an ecclesiastical suit, unless something has been done in it which is manifestly out of the jurisdiction of the Court.] In *Ex parte Smyth*, the Court of Queen's Bench refused to interfere upon this additional ground also, that it did not appear that the ecclesiastical Court had acted contrary to the general law of the land. [*Parke*, B.—The fact that the suitor has appeared in the suit may perhaps impose upon him the necessity of taking notice of all subsequent proceedings

(a) 3 A. & E. 719.

(b) 10 Rep. 68.

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against him.] *Kinning's case* (a) and *Capel v. Child* (b) shew that the party against whom judgment passes ought to have an opportunity of being heard. In the latter case, Lord *Lyndhurst*, C. B., says: "On consideration, then, it appears to me, that if the requisition of the bishop is to be considered a judgment, it is against every principle of justice, that that judgment should be pronounced, not only without giving the party an opportunity of adducing evidence, but without giving him notice of the intention of the Judge to proceed to pronounce the judgment;" and his Lordship afterwards adds: "It is in form a judgment; it is in effect and consequence a judgment." [*Parks*, B.—The proceedings before this Court in *Capel v. Child* had no reference to the practice of the ecclesiastical Court, but were conducted in pursuance of the special provisions of an Act of Parliament; and it was there held, that a man cannot be mulcted or punished without notice of the proceedings. There the vicar had a right to be cited, and was not to be incumbered with a curate without being heard. But that case has no bearing whatever upon the present question, for here a suit has been regularly instituted in the ecclesiastical Court, and the parties have appeared; and how can we say that, according to the practice of that Court, a specific and separate notice must be given before the judgment of the Court can be pronounced against one of the parties to the suit? Even if such a notice were required, the omission would be a mere irregularity. In *Kinning's case*, there was a strict statutory power, which was not pursued. Here, at the most, there is but a mere irregularity, which would afford a good ground for an application, either to the ecclesiastical Court or to a Court of Appeal, but not for a prohibition. But I do not say that there is any irregularity; for, as Mr.

(a) 10 Q. B. 730; *S. C.*, in error, 4 C. B. 507. (b) 2 Cr. & J. 558.

Story has appeared himself or by his proctor, he may be bound to take notice of all the proceedings in the suit.] *Williams v. Lord Bagot* (a) is in the applicant's favour. [Alderson, B.—That was in effect an appeal, and not a prohibition.] Lord Denman, C. J., says, in *Burder v. Veley* (b), that the power of prohibition is in no case taken away by the privilege of appeal."

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PARKER, B.—We are all of opinion that there is no ground for a prohibition, notwithstanding every topic that could have been urged has been urged in support of the application. The case is strictly analogous to the *Marshalsea case*, and falls within the principle of law which is there expounded, namely, that when a Court has jurisdiction over the suit, and proceeds *inverso ordine*, or erroneously, neither the party suing nor the officer is liable to an action at the suit of the party affected by the proceeding. There is no doubt that here the ecclesiastical Court has jurisdiction over the suit, but if any proceeding of an irregular nature has taken place in that suit, it does not take away the jurisdiction of the Court, but merely gives the party a remedy by application to the Court itself, or by appeal. *Ex parte Smyth* is in principle expressly in point. There it was contended, that the judicial committee of the Privy Council had exceeded their jurisdiction in ordering a party to appear absolutely in a suit instituted against the party in the Consistory Court, and the Court of King's Bench refused to grant a prohibition. *Littledale, J.*, there says: "Whether they (the Judicial Committee) are right in so decreeing or not is a question of practice, not of jurisdiction. The temporal Courts cannot take notice of the ecclesiastical Courts, or entertain a question whether, in any particular cause admitted to be of ecclesiastical cognisance, the practice has been regular. The only instances

(a) 3 B. & C. 772.

(b) 12 A. & E. 263.

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in which the temporal Courts can interfere by way of prohibiting any particular proceeding in an ecclesiastical suit, are those in which something is done contrary to the general law of the land, or manifestly out of the jurisdiction of the Court." But that is not the case here, the question being one which relates to the mere practice of the ecclesiastical Court. The question, whether a particular decree is to be enforced or not, on the ground that the party to the suit has had no notice of it, is a matter which the Court must decide for itself. Then with respect to the other cases that have been cited, it is enough to say, that they do not apply to the one before us. *Capel v. Child* turned upon a special power given to the bishop by an Act of Parliament, and the Court held, that it had not been properly pursued. The same remark in substance applies to *Kinning's case*. *Burder v. Veley* does not apply to this question. If any irregularity or defect has taken place in the proceedings in a case, the course is to apply to the Court which has dominion over its own practice, or to a superior tribunal by way of appeal. What has been done in this case does not amount to a contravention of natural justice. In the first part of the proceedings in the suit Mr. Story was present. He does not appear to have had a special notice that a decree was about to be pronounced; and if, by the practice of the ecclesiastical Court, such notice was necessary, and was not given, that forms a ground of application to that Court; but it may be that the parties are bound to take notice of the judgments pronounced by the Court as is the case in the superior Courts.

ALDERSON, B.—I fully agree with what has been said by my Brother *Parke*. Where a prohibition lies to an inferior court, no doubt an appeal will also lie; but the converse does not hold good.

PLATT, B., concurred.

POLLOCK, C. B.—Although I have not heard the whole of the argument, yet I may be permitted to add, that I entirely concur in what has been said by the other members of the Court. What amounts or does not amount to a notice depends on the practice of each Court. In this Court it is the common practice for the Court to order that a particular notice shall be deemed good by its being stuck up in the Master's office, or by its being left at the last known place of abode of the party. But, in the event of that mode of giving notice not being observed, can it be said that this Court has no jurisdiction to proceed in the matter, on the ground that the party has not been served?

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Rule refused.

MARY LONGBOTTOM v. SARAH LONGBOTTOM, Administratrix
of DAVID LONGBOTTOM, deceased.

Nov. 13.

IN this case, the plaintiff had entered a plaint in the County Court of Yorkshire, held at Bradford; the particulars of which were as follows:—

“This action is brought to recover the sum of 17*l.* 8*s.*, due from the defendant, as administratrix of David Longbottom, deceased, to the plaintiff: For that one William Longbottom, deceased, by his last will and testament duly

A plaintiff in a County Court claimed, by his particulars of demand, 17*l.* 8*s.* “due from the defendant as administratrix of D., for that W. by his will bequeathed to D. cer-

tain freehold hereditaments, and also leasehold and other personal estate, on condition of D. paying unto the plaintiff 4*s.* a week during her life. And D., on the death of W., accepted the bequest, and entered into possession, and enjoyed the aforesaid freehold and personal estate, and duly paid the weekly sum during his life; but since his death the defendant, although she has possessed herself of the hereditaments, goods, &c., of D., to an amount more than sufficient for the purpose, has refused to pay the plaintiff.” It appeared that, on the death of D., the freehold estates so bequeathed descended to his nephew and heir-at-law, a minor. On motion for a prohibition:—*Held*, that the sum in question was claimed as a debt, and, consequently, the County Court had jurisdiction. But this Court ordered a certiorari to issue on account of the legal difficulties in the case.

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executed, and proved in the proper ecclesiastical Court, gave, devised, and bequeathed unto the said David Longbottom, deceased, certain freehold hereditaments, and also certain leasehold and other personal estate, on condition of the said David Longbottom paying unto his mother, the above-named plaintiff, the sum of 4s. a week, weekly and every week, during her natural life. And the said David Longbottom, on the death of William Longbottom, accepted the aforesaid devise and bequest, and entered into possession, and received and enjoyed the aforesaid freehold, leasehold, and personal estate so devised and bequeathed to him; and he duly paid the above-named plaintiff, during his life, namely, up to the 1st day of May, 1851, the before-mentioned weekly sum of 4s.; but since the death of the said David Longbottom, namely, for the period of eighty-seven weeks, the defendant, although she has possessed herself of the hereditaments, goods, chattels, and effects of the said David Longbottom, to the amount of more than sufficient for the purpose, has refused to pay the plaintiff the said weekly sum of 4s., or any part thereof—To the plaintiff's damage of 17l. 8s. aforesaid."

The testator, by his will, after directing payment of his debts, &c., bequeathed (inter alia) to his son David Longbottom, his one-half of the Small Clues Colliery, also his one-half of Shugden Colliery, also his one-half of Hodgson Fields Colliery, together with the stock of coal belonging to him in Pit Hills. The will then proceeded:—"And it is my will and mind, that my son David Longbottom shall occupy the farm which I now occupy, with the consent and approbation of my landlord, together with the stock of cattle and farming utensils, on condition of my said son David Longbottom paying the following sums, viz. (inter alia), I will, order, and direct him to pay unto his mother the sum of 4s. a week, weekly and every week during her natural life, and also to allow her so much of the

furniture as will furnish a small cottage house." Shugden Colliery is freehold, and the other collieries are leasehold. David Longbottom died on the 30th of January, 1851; and, on his death, his share in the Shugden Colliery descended to his heir-at-law Henry Longbottom, the nephew of David Longbottom, and a minor.

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C. Pollock moved (a), on an affidavit of the above facts, for a rule to shew cause why a writ of prohibition should not issue, directed to the Judge of the said County Court, to restrain him from further proceeding in this case.—The question intended to be raised is, whether this annuity is not payable out of the freehold estate devised to David Longbottom, and now vested in his heir-at-law; or rather, whether the payment is not a mere condition annexed to the devise of the realty, for the breach of which the testator's heir-at-law is entitled to enter as for a forfeiture. The County Court has no jurisdiction to determine that question. [*Parke*, B.—It is not a case in which "the title to any corporeal or incorporeal hereditaments" is in question, "or in which the validity of any devise, bequest, or limitation under any will" is disputed, so as to be excepted from the jurisdiction of the County Court by the 58th section of the 9 & 10 Vict. c. 95.] The devise creates a mere trust in equity, over which the County Court has no jurisdiction. The 65th is the only section which gives the Court an equitable jurisdiction, and that merely extends to the unliquidated balance of a partnership account, "or the amount or part of the amount of a distributive share under an intestacy, or of any *legacy* under a will." In *Pears v. Wilson* (b), the plaintiff claimed from the executors a distributive share of the *residue* of the testator's personal estate, and that was held a legacy within the 65th section of the 9 & 10 Vict. c. 95, notwithstanding the devise was to the executors in trust. Here the intestate was not

(a) November 3.

(b) 6 Exch. 833.

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executor, but devisee, with a condition attached to the gift. The definition of a legacy, given in Godolph. pt. 3, c. 1, s. 1, and adopted in Williams on Executors, p. 905, 4th edit., is, "some particular thing or things given or left, either by a testator in his testament wherein an executor is appointed, *to be paid or performed by his executor*; or, by an intestate in a codicil or last will wherein no executor is appointed, to be paid or performed by an administrator." A similar definition is given in Swinburne, vol. 1, p. 35. [*Parke, B.*—It would seem that the plaintiff has no claim against the defendant, but that question the County Court Judge could decide. *Alderson, B.*—It would be more reasonable to move for a certiorari, on the ground that it is a fit question to be decided in the superior Court.] A certiorari only lies where the superior Court can dispose of the cause of action: here there is a mere trust. [*Parke, B.*—Lord *Holt* held, "that a devisee may maintain an action at common law against a tertenant for a legacy devised out of land; for where a statute, as the statute of wills, gives a right, the party by consequence shall have an action at law to recover it: *Ewer v. Jones (a)*, Com. Dig. "Dett" (A. 9). Here the devisee, by accepting the estate, undertakes to pay the annuity. Then if the only question is, whether he is liable by reason of the land being in his hands, the County Court may entertain that.] This is strictly a condition attaching to the realty; *Crickmere v. Paterson (b)*, for the breach of which there is a remedy by ejectment; and until the realty is exhausted, the personalty is not subject to the payment of the annuity. The County Court Judge would have to decide whether the realty or personalty is liable, and to what extent. Contrasting the language of the 65th section with that of the 58th, the words "distributive share under a will" mean the ordinary distribution by an executor. Further, the

(a) 2 Salk. 414; 6 Mod. 26; Holt, 419.

(b) Cro. Eliz. 146.

case falls within the 58th section; for the question, whether the devisee had a title as against the annuitant, would involve the validity of the bequest. Annuities, whether charged on realty or personalty, are incorporeal hereditaments: 2 Blac. Comm. 41.—He also referred to *Winchester's case* (a).

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J. Brown shewed cause in the first instance.—Assuming that an annuity is an incorporeal hereditament, the title to this annuity is not in question, but only whether the defendant is responsible for the arrears. An action will lie for these arrears; the previous payments by the devisee being a circumstance from which the jury may infer a contract to pay. *Hawkes v. Saunders* (b) decided, that assumpsit lies against an executrix for a legacy upon a promise in consideration of assets. Besides, it is doubtful whether the action of annuity is abolished by 3 & 4 Will. 4, c. 27, s. 36. In Com. Dig. "Action," (D. 4), annuity is classed among mixt actions; but in *Bodvell v. Bodvell* (c), it was considered a personal action only; and, if so, the County Court has jurisdiction under the 58th section. At all events, this is a claim to a *legacy* within the 65th section. Blackstone does not limit the definition of a legacy to something to be paid or performed by an executor, but describes it as "a bequest or gift of goods and chattels by testament:" 2 Blac. Comm. 512. The authorities collected in *Roper on Legacies*, p. 1487, shew, that an annuity charged on land is a "legacy." If the definition of the other side be correct, the jurisdiction of the County Court would be excluded in all cases of legacies charged upon real estate, where the condition was not to be performed, or the legacy paid, by the executor. A Court of equity would relieve against a forfeiture on payment of the arrears of the annuity: Cruise Dig. tit. xiii. ch. ii. ss. 30, 31, 32.

(a) 3 Rep. 2 b.

(b) 1 Cowp. 289.

(c) Sir W. Jones, 214.

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C. Pollock, in reply, cited Williams on Executors, p. 1028.

Cur. adv. vult.

POLLOCK, C. B., now said—In this case, we think that a certiorari ought to issue. Looking at the particulars of the plaintiff's demand, we are of opinion that the amount in question is claimed as a debt, and not as a legacy. If this were the case of a pure matter of equity, neither this Court nor the County Court would have any jurisdiction over it. If it were a claim to a legacy, the County Court would have jurisdiction and this Court would not, and, therefore, we certainly should not interfere. But, although it appears to us that the subject-matter of the claim is a debt, we think that a certiorari ought to issue to remove the plaint into this Court, on account of the legal difficulties which belong to the case.

Rule absolute for a certiorari.

Nov. 20, 22.

CROWHURST and MARY his Wife v. LAVERACK.

ASSUMPSIT.—The first count of the declaration stated, that the defendant, whilst the plaintiff Mary was unmarried, entered into the following agreement—“Agreement made between L., of &c., and G. single-woman, respecting the maintenance of a certain illegitimate female child. L. agrees to pay 45*l.* to the child as follows:—12*l.* to be paid down, and the remaining 33*l.* in four equal payments in four years; the first of such payments, 8*l.* 5*s.* to be made on the 30th of December, 1846, and every succeeding 30th December, till the period of four years do expire. But if the child should die before the four years do expire, the payments to cease at such decease.” The 12*l.* was paid at the time, and the agreement was placed in the hands of the attesting witness. The mother, having afterwards heard that the father had got possession of the agreement, obtained against him an affiliation order for payment of a weekly sum, which was duly paid. Subsequently, the mother married, and joined with her husband in an action against the father, one count of the declaration being for necessities supplied to the child by her before her marriage, and another count for necessities supplied by her and her husband after their marriage:—*Held*, that, if the meaning of the agreement was, that the father would make the stipulated payments if the mother would support the child, then the agreement was without consideration; but if the meaning of it was, that the mother would undertake the *sole maintenance* without affiliating the child, in which case there would be a good consideration, then the agreement had not been performed.

Quære—whether the agreement was within the 4th section of the Statute of Frauds. Also, whether the wife could join with her husband for the recovery of necessities supplied to the child after the marriage.

ried, was indebted to the said Mary in 30*l.* for meat, drink, washing, lodging, clothing, goods, and chattels, and other necessities by the said Mary then found and provided, at the request of the defendant, for a certain female child; and the defendant, in consideration of the premises, whilst the said Mary was unmarried, promised the said Mary to pay the said money on request.—The second count stated, that the defendant, after the intermarriage of the plaintiffs, was indebted to the plaintiffs in 50*l.* for meat, drink, &c. and other necessities by the plaintiffs found and provided at the request of the defendant for the said female child, and in consideration thereof promised to pay the plaintiffs.—Breach, non-payment to Mary whilst she was unmarried, or to the plaintiffs since the intermarriage.

Plea, (*inter alia*), non assumpsit.—Issue thereon.

At the trial, before Lord *Campbell*, C. J., at the last York Summer Assizes, it appeared that the defendant was the father, and the female plaintiff the mother, of an illegitimate child born before her marriage with the other plaintiff. After the birth of the child, the following agreement was entered into:—

“Agreement made this 14th of March, 1846, between J. Laverack, of &c., on the one part, and Mary Garlick, of &c., singlewoman, on the other part, respecting the maintenance of a certain illegitimate female child. The said J. Laverack agrees to pay the sum of 45*l.* to the said child as follows:—12*l.* to be paid down, and the remaining 33*l.* in four equal payments in four years, the first of such payments, 8*l.* 5*s.*, to be made on the 30th of December, 1846, and every succeeding 30th day of December, till the period of four years do expire. But if the said child should die before the said four years do expire as aforesaid, the payment to cease at such decease.—In witness whereof we have hereunto signed our names this 14th of March, 1846.

J. LAVERACK.
M. GARLICK.”

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The sum of 12*l.* was paid at the time, and the agreement was placed in the hands of the attesting witness. In the month of November following, the plaintiff Mary, having heard that the defendant had obtained possession of the agreement, and believing (as was alleged) that she had lost her remedy under that instrument, went before a magistrate, and on the 31st of December following obtained an order of affiliation against the defendant, by which he was ordered to pay 2*s.* 6*d.* a week and expenses. Weekly payments were made under this order until the 26th of March, 1848, when the plaintiffs were married, and the order ceased to operate.

On the part of the defendant it was contended, first, that the first count was not proved, inasmuch as there was no sufficient consideration for the defendant's promise, and that, at all events, the bargain had been abandoned by the application for the order of affiliation; and, secondly, that the agreement was void under the 4th section of the Statute of Frauds, inasmuch as it was not to be performed within a year, and there was no consideration on the face of it. The learned Judge overruled the objection to the validity of the agreement, and left it to the jury to say whether the agreement had been abandoned. The jury found that it had not been abandoned, and returned a verdict for the plaintiffs with 8*l.* 10*s.* damages on the first count, and 16*l.* 10*s.* upon the second count.

Watson in the present Term obtained a rule nisi for a new trial, on the ground of misdirection, or to arrest the judgment on the second count, on the ground that the wife was improperly joined with her husband in respect of the cause of action alleged in the second count.

Pearce shewed cause (Nov. 20 and 22).—First, the first count of the declaration was proved. The consideration for the defendant's promise was executed, and the main-

tenance of the child at the defendant's request is a good consideration for that promise. In *Linnegar v. Hodd* (a), where the mother of an illegitimate child sued the father for food and other necessities supplied to the child upon a promise by him to pay her for its maintenance, it was held that the promise was binding, and that, the consideration having been executed, *indebitatus assumpsit* lay. In *Hicks v. Gregory* (b), the following letter was written by the father to the mother of his illegitimate child, and was held by the majority of the Court to disclose a sufficient consideration for the promise to pay the annuity mentioned in the letter.—“As I always promised that you and your child should never want, I will allow you 100*l.* a year for your life and little Emma's, to begin from the 1st of July, and to be paid quarterly, which I think will be sufficient to keep you in great comfort; of course, if I hear of your behaving ill, or bringing up your child improperly, I will stop the allowance to you.” And in *Jennings v. Brown* (c), where the reputed father of an illegitimate child promised to pay the mother an annuity if she would maintain the child and keep secret their connection, it was held that the maintenance of the child was a sufficient consideration to maintain *assumpsit*. Those authorities establish, that in this case there is a sufficient consideration to support the promise; and the jury were warranted in finding that the agreement was not abandoned by the female plaintiff.

Secondly.—The agreement is not within the 4th section of the Statute of Frauds, inasmuch as it *may* possibly be performed within the year, and the statute applies only to cases where the agreement, from its terms, expressly appears to be *incapable* of performance within the year: *Peter v. Compton* (d); 1 Smith's L. C. 143, notes. The child might die within the year, and the agreement contemplates

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(a) 5 C. B. 437.

(b) 8 C. B. 378.

(c) 9 M. & W. 496.

(d) Skinner, 353.

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such a contingency; moreover, it would seem that the statute does not apply where the action is brought upon an *executed* consideration: *Souch v. Strawbridge* (a), per *Tindal*, C. J. "For, as the object of the legislature clearly was to prevent the setting up, by means of fraud and perjury, of contracts or promises by parol, upon which parties might otherwise have been charged for their whole lives, it does not appear unreasonable to limit the statute to such actions only as are brought to recover damages for the non-performance of contracts which are not to be performed within a year from the time of their being made:" 2 *Taylor on Evidence*, 696. Assuming, however, that the statute applies, the agreement discloses a sufficient consideration. The cases already quoted shew that the maintenance of the child at the father's request is a sufficient consideration for a promise to pay the expenses so incurred; and the inference is that the defendant is the father of the child; and if there be any ambiguity upon this point in the agreement, it is cleared up by the evidence.

He then argued that there was no misjoinder with reference to the cause of action in the second count, inasmuch as, whenever the wife is the meritorious cause of action, she may either join with her husband or he may sue alone. On this point, he cited *Bull. N. P.* 186, *Com. Dig.* "Baron and Feme," (X), *Ridgood v. Way* (b), *Philliskirk v. Pluckwell* (c), 15 & 16 *Vict. c.* 76, s. 40. At all events, the Court would intend, after verdict, that the promise was made to the husband and wife: *France v. White* (d), *Nurse v. Wills* (e), 1 *Chit. Plead.* 705.

Watson in support of the rule.—There is no consideration for such an agreement, except the undertaking to refrain from affiliating the child, and that has not been performed.

(a) 2 C. B. 814.

(b) 2 W. Bl. 1236.

(c) 2 M. & Selw. 393.

(d) 1 M. & Gr. 731.

(e) 4 B. & Ad. 739; in error,
1 A. & E. 65.

A mere agreement to do something which the party is under a legal obligation to perform, is no consideration for a promise. A mother, while she remains unmarried, is bound to maintain her illegitimate child until it attains the age of sixteen; after her marriage her husband must maintain the child: 4 & 5 Will. 4, c. 76, ss. 57, 71. That provision is not affected by the 7 & 8 Vict. c. 100, s. 2. The real consideration for agreements of this kind is the undertaking by the mother that she would support the child without affiliating it: *Jennings v. Brown* (a), *Linnegar v. Hodd* (b). [*Alderson*, B.—If the agreement be construed as if the words were “sole maintenance,” then it has not been performed. *Parke*, B.—According to the literal construction of this agreement, the defendant undertakes to pay if the female plaintiff will support the child; and in that case there is no consideration for the agreement, since she was by law bound to do so. If the meaning is, that she will undertake the sole maintenance of the child without affiliating it, in which case there would be a good consideration, then the agreement has not been performed.]

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The Court then suggested that a *stet processus* should be entered; and the rule was made absolute for a new trial, unless a *stet processus* were entered in a month.

Rule accordingly.

(a) 9 M. & W. 496.

(b) 5 C. B. 437.

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Nov. 29.

FRANK and HANCOX, Appellants; EDWARDS and Others,
Respondents.

In 1841, T. R. was, by a resolution of the vestry, appointed permanent assistant overseer to the parish of W. F., at an annual salary of 16*l.*, and he performed the duties without giving security. In May, 1846, it was resolved by the vestry, that he should continue his office upon giving security; and accordingly, in June, 1846, a bond was entered into by T. R. with two sureties in pursuance of the 59 Geo. 3, c. 12, subject to the condition that the said T. R. should, from time to time, and at all times thereafter during the continuance of his said appointment, faithfully

THIS was an appeal to this Court on behalf of Frank and Hancox, two of the defendants below, against the decision of the Judge of the County Court held at Oswestry, in Shropshire.

The action was brought against Thomas Roberts, Edward Frank, and Abraham Hancox, for the recovery of the sum of 40*l.* 10*s.* 6*d.*, on a bond hereinafter mentioned, into which Roberts had entered as principal, and Frank and Hancox as his sureties.

The facts, as they appeared in evidence, were these:— At a vestry meeting on the 8th of April, 1841, the defendant Thomas Roberts was appointed assistant overseer of the poor of the parish of West Felton, and the following entries were made in the parish books:—"At a vestry held this 8th of April, 1841, of which due notice was given, at the instigation of eleven housekeepers, for the purpose of appointing a permanent overseer, it was agreed that Mr. Thomas Roberts, of the Lion Inn, be appointed permanent overseer, at the annual salary of 16*l.*; and he the said Thomas Roberts is accordingly appointed." To this several signatures were appended.

"I, Thomas Roberts, do agree to serve the office of permanent overseer of the poor faithfully and honestly, for

account for the collection of the rates, &c., and duly execute all the duties of the office; and a few days afterwards a warrant of the appointment of T. R. as assistant overseer was executed by the magistrates. T. R. continued to perform the duties of assistant overseer till 1851, but the duties having become lessened, in consequence, amongst other things, of the appointment of a relieving officer in that year, a vestry (amongst whom was one of the sureties to the bond), with the consent of T. R., came to the resolution, that T. R. should continue the office at a salary of 14*l.* per annum. After this, T. R. continued to discharge the duties of the office for some months, and then resigned it, when he was found in debt to the parish:—*Held*, that the resolution of the vestry of 1851 did not amount to a revocation of the original appointment of T. R., but that he continued in the office at a reduced salary, and consequently that the sureties were not discharged from liability under the bond.

the parish of West Felton, for the ensuing year, and from year to year from this time until regularly discontinued, for the annual salary of 16*l*., to be levied and paid out of the poor-rates of the said parish.

(Signed)

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Roberts performed the duties of assistant overseer at the said salary of 16*l*. per annum, from the 8th of April, 1841, without giving any security. At a vestry meeting of the said parish, held on the 27th of April, 1846, it was agreed by a majority of the ratepayers "That Mr. T. Roberts continue the office of assistant overseer, giving security for the due performance of his duties.

(Signed)

W. OWEN, Chairman."

On the 28th of May following a vestry meeting was again held, pursuant to proper notice, and it was then resolved, "That Mr. T. Roberts, the assistant overseer, continue his office as usual, and that he give securities to the parish to the amount of 66*l*. for the poor-rates for the parish of West Felton, in the county of Salop; and in addition, that he give securities to the parish for the assessed taxes and other taxes that he collects, to the amount of 200*l*., to the said parish." This was signed by several parties.

On the 11th of June, 1846, the bond on which the action was brought was duly executed by the defendants. The condition of the bond, after referring to the 59 Geo. 3, c. 2, and reciting that, on the 27th of April last past, Roberts was nominated and elected assistant overseer, proceeded: "Now therefore the condition of the above-written obligation is such, that, if the above-bounden Thomas Roberts shall, from time to time and at all times hereafter during the continuance of his said appointment to the office of assistant overseer of the poor of the said parish of West Felton, well and faithfully collect and get

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in the full and true amount of each and every rate which shall be made for the relief of the poor of the said parish of West Felton, and pay over and duly account for the full amount of such rate, without any deduction or abatement thereout for or by reason or on account of any matter, cause, or thing whatsoever, (save and except as to such and so many and such part or parts of all or either of such rates which any of the magistrates, acting in and for the division of the Hundred of Oswestry, and at the petty sessions assembled, shall pronounce or declare to be illegally made and assessed, or not capable of being by law recovered, or which they the said magistrates shall order and direct not to be enforced against any poor person or persons, or which cannot be recovered after all due and legal means have been resorted to for the purpose of enforcing the payment of the same); and if the said Thomas Roberts shall faithfully attend and obey all the orders and directions of the board of directors of the Oswestry House of Industry, and do and shall at all times hereafter (during his continuance in office as such assistant overseer), weekly and every week, upon Mondays, attend at the board-room of the said directors and make a report of the state of the out-poor of the said parish of West Felton for the week preceding, and attend to such orders as the board of the said directors shall direct and require, and visit such of the out-poor as shall be found requisite, and also pay or cause to be paid to the out-poor and other persons such sum or sums of money as shall be ordered by the said directors, and also shall and will, from time to time and at all times, when required by the said directors or by any legal vestry of the inhabitants of the said parish of West Felton, render a just and true account or accounts of all monies received or expended by him, and pay over all and any part of such balance or balances which shall appear to be in his hands, to such person or persons, and at such time or times, place or places, as the said vestry

shall direct or appoint, and do also faithfully and diligently execute all the duties of the office of an overseer of the poor, and all such other duties (if any) as are contained in his warrant of appointment, according to the several Acts, laws, and regulations now in force relating to the office or duties of an overseer of the poor, then the above-written obligation shall be void, or else remain in full force and virtue."

On the 25th of June, 1846, a warrant of appointment was executed by the magistrates, of which the following is a copy:—

"Parish of West Fel- } "Whereas the inhabitants of the
ton in the County of } parish of West Felton, in the county
Salop (to wit). } of Salop, in vestry assembled in the
said parish, on the 27th of April, 1846, did nominate and
appoint Thomas Roberts, of the said parish of West Felton,
innkeeper, to be an assistant overseer of the poor of the
said parish of West Felton, and did determine that he
should collect the rates, make out the poor-rate assess-
ments, and execute and perform all the duties of an over-
seer of the poor of the said parish, and did fix the yearly
sum of 16*l.* as and for the yearly salary of the said Tho-
mas Roberts for the execution of the said office; now we,
two of Her Majesty's Justices of the Peace in and for the
said county of Salop, in pursuance of the statute in such
case made and provided, do hereby appoint the said Thomas
Roberts to be an assistant overseer of the poor of the said
parish of West Felton; and we do hereby authorise and em-
power him to execute and perform the said duties, and to
receive the salary so as aforesaid fixed by the said inhabit-
ants in their said vestry.—Given under our hands and
seals this 25th day of June, 1846. (Signed) &c."

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The defendant Roberts continued to perform the duties of assistant overseer, and to receive the annual salary of 16*l.*, up to the 6th of March, 1851, when it appeared that

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the labours of an assistant overseer of the poor in the collection of the rates had been much reduced by the operation of the Act 13 & 14 Vict. c. 99 (the Small Tenements Rating Act), and that the other duties of the office were lessened by the appointment under the Poor Law Acts of a separate relieving officer. This led to a vestry meeting being called, which took place on the said 6th of March, 1851. Thomas Roberts attended, and two other persons also attended as candidates for the office of assistant overseer at the contemplated reduced salary, in the event of the discontinuance of Roberts in his office. Roberts was called in before the meeting, and the chairman proposed to him the payment of a less salary, because, under the new Tenements Rating Act, he would have less to do. Roberts consented to receive the diminished salary. The following resolution was entered in the parish books: "At a vestry meeting of the inhabitants of the parish of West Felton, in the county of Salop, held the 6th of March, 1851, pursuant to proper notice given thereof, it was agreed upon by us the undersigned, that Mr. Thomas Roberts, assistant overseer, continue the assistant overseer's office at the salary of 14*l.* per annum from year to year, unless he receives proper notice from the inhabitants of West Felton, to commence from Lady Day, 1851."—This was signed by Abraham Hancox, the appellant in this case, and by several others.

Roberts discharged the duties of the office for some months, but did not apply for any new appointment by the magistrates, and subsequently resigned the office; and at the audit, in November 1851, the sum for which the present action was brought was found to be due from him.

Judgment was given for the plaintiffs.

The question for the opinion of this Court was, whether the change made by the vestry on the 6th of March, 1851, in the terms on which Roberts was to act as an assistant

overseer, did or did not create an office different to that for the due discharge of which the sureties had entered into the bond.

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W. H. Bayley for the appellants.—The change which was effected by the resolution of the vestry, passed on the 6th of March, 1851, operated as a revocation of the appointment of Roberts, the principal, in the year 1846, at the time the bond was executed, and thereby discharged the sureties. In the words of *Buller, J.*, in *Straton v. Rastall* (a), “as against a surety, the contract cannot be carried beyond the strict letter of it.” By that resolution of the vestry, a material alteration was made both in the duties and in the emoluments of the office of the assistant overseer. [*Parke, B.*—The bond was given in pursuance of the 59 Geo. 3, c. 12; and by the 7th section it is enacted, that “every person or persons so appointed shall continue to be an assistant overseer of the poor until he or they shall resign such office, or until his or their appointment shall be revoked by the inhabitants of the parish in vestry assembled, and no longer.” We cannot here enter into the equitable consideration of the liability of the sureties: *Davey v. Prendergrass* (b); the simple question being, whether the appointment of the assistant overseer, with respect to which this bond was given, was either resigned by him or was revoked by the vestry. *Alderson, B.*—In fact, he continues in the office, but at a reduced salary. *Parke, B.*—The condition does not contain any stipulation that the appointment must be continued at the same salary. *Alderson, B.*—With regard to the equity of the case, it may be observed that one of the sureties was present at and took a part in the resolution of the vestry on the 6th of March, 1851.] *Bamford v. Iles* (c) resembles the present case: *Pollock, C. B.*, there says, “The statute only

(a) 2 T. R. 370.

(b) 5 B. & Ald. 187.

(c) 3 Exch. 380.

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means this, that, if the appointment be made generally, it shall continue until revoked. Then, if a party be re-appointed on different terms, that is a revocation of his former appointment." [Parke, B.—There the appointment was for a year, and at the end of that time a re-election was necessary; but here the appointment is a continuing one.] What took place at the last vestry meeting is tantamount to a revocation of the office, for it cannot be said that the principal continues to perform "the duties" of the office, when a most material alteration has been effected in those duties.—He referred to *Augero v. Keen* (a) and *Lord Arlington v. Merrick* (b).

Keating, for the respondents, was not called upon.

PABKE, B.—The present case is very different from that of *Bamford v. Iles*, for there the appointment of the principal was for a year only, and at the expiration of that period a re-election was necessary; but here the appointment is a continuing one from year to year, and no fresh election is necessary. The only question is, whether the reduction of the salary, which took place by an arrangement between the assistant overseer and the vestry, can be considered as a revocation of the original appointment. We are all of opinion that it was not; but that the appointment which Roberts, the principal, held after the resolution of March, 1851, was the old appointment, and that he continued in the old office at a reduced salary. The condition of the bond does not contain any stipulation by which the sureties are to be exempted from their liability under the bond, in case there shall be a reduction in the salary. If the sureties had thought that the amount of the salary was an essential ingredient in the contract, they ought to have taken care to have had a stipulation inserted

(a) 1 M. & W. 390.

(b) 2 Wms. Saund. 415 b.

in the condition of the bond, that they would be liable only so long as the overseer was continued at the same salary. That they have not done, and it therefore follows, that the assistant overseer still continued in his office under the old appointment, but at a reduced salary.

The appeal must therefore be dismissed, and, according to the general rule in these cases, with costs.

ALDERSON, B., PLATT, B., and MARTIN, B., concurred.

Appeal dismissed, with costs.

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TROVER by the plaintiffs, as assignees, for machinery, power-looms, and other goods, laying the conversion after the bankruptcy.

Pleas—not guilty and not possessed; upon which issues were joined.

At the trial, before Lord *Campbell*, C. J., at the last Summer Assizes for the county of York, the following facts appeared:—The bankrupt carried on the business of a stuff manufacturer and worsted spinner at Bradford, and, for the purpose of carrying on that business, he rented a mill and machinery; and his father Luke Normanton was

The assignment by way of mortgage by a trader of his stock and implements of trade, where such assignment does not include a moiety of the whole of his effects, is not per se an act of bankruptcy, although the effect of putting the instrument in force would be to stop the business.

A manufacturer assigned, by way of mortgage, all his machinery as a security for certain bills of exchange, drawn by him upon certain of his customers, accepted by them, and discounted by the mortgagor, and also for such other bills as should, from time to time, be discounted in like manner; and the amount of the security was not to exceed 2000*l*. And the mortgagee was empowered, in default of payment of the bills, three days after demand to enter the premises, and to take possession of all the machinery, and to sell the same, and, after payment of the amount of the bills then due or running, to pay the surplus of the proceeds of the sale to the mortgagor. At the time of the execution of the deed the machinery was worth 1500*l*., and the trader's effects much exceeded 3000*l*.; and he deposed that the deed was executed with a view to obtain cash for the bills, and without any intent to defeat or delay his creditors:—*Held*, that there was no evidence to constitute the execution of the assignment an act of bankruptcy; and further, that, if there had been any such evidence, the proper question for the jury was not, whether the deed, if acted upon, would have stopped the business, but whether it would have produced insolvency.

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not a partner with him, but acted as manager of the business. The defendant had been in the habit of discounting bills of exchange, drawn by the bankrupt upon Messrs. Brooks & Co., a firm carrying on business at Manchester; and in June, 1851, the defendant applied to the Normantons for security for the advances he was from time to time making on their bills; and accordingly, on the 2nd of July following, a deed of assignment was executed by the two Normantons of the one part, and by the defendant of the other part; and, as a further security, a warrant of attorney was executed by them to confess judgment for the amount of money secured by the deed of assignment. This deed, after reciting that the defendant W. Waud is in the habit from week to week of discounting for the said L. Normanton and I. Normanton, to enable them to carry on their business, certain bills of exchange at different dates, chiefly drawn by the said I. Normanton upon and accepted by Messrs. Brook, Son, & Co., of Manchester, and indorsed by the said L. Normanton and I. Normanton to the said W. Waud, and certain other bills of exchange received or drawn by them in their trade; and after reciting that the said W. Waud, not being satisfied with the solvency of the party or parties whose name or names appear upon such bill or bills of exchange as the said L. Normanton and I. Normanton from time to time present to him for the purpose of being discounted, had refused to further discount for them any of such bill or bills as before mentioned, unless the said L. Normanton and I. Normanton, in addition to such bill or bills of exchange, should give to the said W. Waud the security hereinafter mentioned (but such security not to exceed the amount or sum hereinafter named); which the said L. Normanton and I. Normanton have consented and agreed to do; and after reciting that it had been agreed by and between the said L. Normanton and I. Normanton and W. Waud, that this security should extend to and be available to the said W.

Waud, his executors, administrators, and assigns, for such sum or sums of money as he should from time to time pay to the said L. Normanton and I. Normanton upon the discounting of any bill or bills of exchange (not exceeding the amount hereinafter named), notwithstanding any of the said bill or bills of exchange shall not have come to maturity or have been dishonoured, it being the intention of the said parties hereto that the said W. Waud should be at liberty at any time or times hereafter, so long as any bill or bills of exchange received by him from the said L. Normanton and I. Normanton should be owing and still to become due, to enter into and upon and take possession of the frames, looms, machinery, and effects hereby assigned, and hold and enjoy the same as hereinafter expressed: witnessed "that, in pursuance of the said agreement, and in consideration of the premises, and also in consideration of ten shillings a piece of lawful English money to each of them the said L. Normanton and I. Normanton in hand paid by the said W. Waud at or before the execution hereof, the receipt whereof is hereby acknowledged, they the said L. Normanton and I. Normanton do and each of them doth by these presents assign and transfer unto the said W. Waud, his executors, administrators, and assigns, all those fifteen spinning frames, with the gearing, machinery, and effects connected therewith and belonging thereto, in and upon the junction mill, situate at Laister Dyke aforesaid, now used and occupied by the said L. Normanton and I. Normanton, and used and employed by them in their trade or business of manufacturers; And also all those 133 worsted power looms, with the gearing, machinery, and effects connected therewith and belonging thereto, in and upon the said junction mill aforesaid, now used and occupied by the said L. Normanton and I. Normanton, and used and employed by them in their trade or business of manufacturers; And all other spinning frames, looms, machinery, chattels, and effects, now erected or erecting, or hereafter to be

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erected, fixed, or set up, or which may belong to the said L. Normanton and I. Normanton, in and about the said mill as aforesaid; And all the estate, right, title, and interest, both legal and equitable, of them the said L. Normanton and I. Normanton therein, To have, hold, receive, take, and enjoy the said spinning frames, looms, machinery, and effects hereby assigned or intended so to be, unto the said W. Waud, his executors, administrators, and assigns, as and for his and their own proper goods, chattels, and effects, absolutely and for ever, upon the trusts hereinafter declared concerning the same, that is to say, upon trust for securing the payment of any sum or sums of money (not exceeding in the whole the principal sum hereinafter mentioned) in which the said L. Normanton and I. Normanton may at any time or from time to time hereafter be indebted to the said W. Waud, his executors, or administrators, for or on account of any bill or bills of exchange made, drawn, paid, indorsed, or accepted by the said L. Normanton and I. Normanton, or any other person or persons whomsoever; and discounted by the said W. Waud for and to the use and benefit of the said L. Normanton and I. Normanton, or on any other account whatsoever, clear of all deductions whatsoever; and for that purpose, in case default shall be made in payment of the whole or any part of such sum or sums of money within three days after the same shall have been demanded, then upon trust, at any time or times thereafter, so long as any of the said sum or sums or any part thereof shall remain unpaid, without the necessity of any further consent or concurrence on the part of the said L. Normanton and I. Normanton, their executors, administrators, or assigns, to take possession of the said frames, looms, machinery, chattels, and effects, and thenceforth to hold and enjoy the same to and for his and their absolute use and benefit; and also, at his and their discretion, to make sale and absolutely dispose of the same chattels and effects by public auction or private contract,

either together or in parcels, with liberty to buy in and re-sell the same, without being responsible for any loss that may be incurred thereby, and to give receipts for the purchase-money, which shall effectually exonerate the persons paying the same from all responsibility with respect to the application thereof, or from inquiring into the necessity or expediency of any such sale or sales, or whether any such default as aforesaid shall have been made. And upon further trust, that, in case any such sale or sales as aforesaid shall be made by the said W. Waud, his executors, administrators, or assigns, they shall stand possessed of the purchase-mones, upon trust, in the first place, to defray, retain, or pay and satisfy all costs, charges, and expenses incident to such sale or sales and to the execution of these presents; and, in the next place, to retain or pay and satisfy unto the said W. Waud, his executors, administrators, or assigns, the sum or sums (not exceeding the amount hereinafter mentioned) in which the said L. Normanton and I. Normanton, their executors or administrators, shall be indebted to him or them on the balance of or for or on account of any bill or bills of exchange made, drawn, paid, indorsed, and accepted by the said L. Normanton and I. Normanton and discounted by the said W. Waud, or any other bill or bills of exchange discounted for the said L. Normanton and I. Normanton by the said W. Waud; and all costs, charges, and expenses sustained or incurred in or about any suit or suits at law or in equity, which shall be instituted for enforcing the payment of any such sum or sums of money or any part thereof; and then upon trust to pay over the surplus (if any) unto the said L. Normanton and I. Normanton, their executors, administrators, or assigns, for their own use and benefit. Provided always, and it is hereby further declared, that the total amount of principal monies to be ultimately recoverable under or by virtue of the security hereby made, shall not exceed the sum of 2000*l*.; and that such security shall not be consi-

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dered as wholly or partially satisfied by the payment or liquidation, otherwise than by putting in force the same security, of any sum or sums of money which shall at any time or times or from time to time be due and owing from the said L. Normanton and I. Normanton, trading as aforesaid, on such accounts as aforesaid; or as wholly satisfied by the payment or liquidation by means of such security of the entire balance which shall at any time be so due and owing, unless the same, either alone or together with any sum or sums previously paid or liquidated, shall in like manner be equal to the total amount aforesaid; but that the said security shall extend to cover any sum or sums of money which shall, for the time being, constitute the balance due from the said L. Normanton and I. Normanton, trading as aforesaid, until principal monies, to the full amount aforesaid, shall have been actually recovered or satisfied by means of the security herein contained. Provided also, and it is hereby further declared and agreed by and between the said parties hereto, that the said W. Waud, his executors, administrators, or assigns, shall and will, upon receiving seven days' previous notice in writing from the said L. Normanton and I. Normanton, their executors, administrators, or assigns, for that purpose, deliver to the said L. Normanton and I. Normanton, or either of them, or their executors, administrators, or assigns, an account in writing of all and every the bills of exchange or other bills which may have been discounted by the said W. Waud, his executors, or administrators for them as aforesaid. And the said L. Normanton and I. Normanton do hereby, for themselves severally and respectively, and for their several and respective heirs, executors, and administrators, covenant and agree with the said W. Waud, his executors, administrators, and assigns, that they the said L. Normanton and I. Normanton, or one of them, their or one of their heirs, executors, or administrators, shall and will pay or cause to be paid unto the said W. Waud, his

executors, administrators, or assigns, such sum or sums of money (not exceeding the principal sum aforesaid) as may at any time or from time to time hereafter be due and owing from the said L. Normanton and I. Normanton to the said W. Waud, his executors, administrators, or assigns, at the time or times and in the manner hereinafter expressed for payment of the same, according to the true intent and meaning of those presents. And the said W. Waud doth hereby, for himself, his heirs, executors, and administrators, covenant with the said L. Normanton and I. Normanton, their executors, administrators, or assigns, that he or they the said W. Waud, his heirs, executors, or administrators, will not take possession of or proceed to a sale of the said frames, looms, machinery, chattels, and effects, hereby assigned under the trust hereinbefore contained, until such default shall have been made by the said L. Normanton and I. Normanton or one of them, their or one of their heirs, executors, or administrators, in payment of the monies hereby secured or intended so to be, or some part thereof, as is hereinbefore mentioned or provided in and by the same trust for sale; but so, nevertheless, that this present covenant shall not affect any purchaser or purchasers under the said trust for sale, nor any person or persons claiming under such purchaser or purchasers."

At the time of the date and the execution of this indenture, there were outstanding four bills of exchange for 100*l.* each, drawn by I. Normanton and accepted by Messrs. Brooks & Co., which had been discounted by the defendant for the bankrupt at 20*l.* per cent. Between the date of the deed and the November following, bills were from time to time drawn, accepted, and discounted upon the preceding terms, and those which came to maturity were duly honoured and paid; but in that month Messrs. Brooks & Co. became insolvent, and the bills then due were in consequence dishonoured by them. On the 2nd of December, the defendant held dishonoured acceptances

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to the amount of 291*l*. 10*s*., and five other bills to the amount of 500*l*., which he had discounted, but which were not then due. On the 2nd of December, the defendant entered upon the premises of the mill, and took possession of the machinery and effects therein under the deed of assignment. Proceedings in bankruptcy were shortly afterwards taken against Isaac Normanton; and the assignees brought this action for the recovery of the goods and chattels so seized. The bankrupt was called as a witness on the part of the plaintiffs, and deposed that, at the time he executed the deed, he had effects to the amount of upwards of 3200*l*., and that the whole of his obligations did not exceed 2900*l*.; and that his object in executing the deed was to obtain the means of discounting the bills of Messrs. Brooks & Co., and thereby to dispose of his manufactured goods to them for cash, and that he had no intention whatever of preferring the defendant to his other creditors; and he added, that if Messrs. Brooks & Co. had not failed, he could have met all his liabilities.

On the part of the defendant, it was contended that there was no evidence of an act of bankruptcy. The learned Judge left the case to the jury; and in the course of the summing up, he told them that the execution of the deed would be an act of bankruptcy if the effect of putting the deed in force would be to stop the bankrupt's business. A verdict was found for the plaintiffs, with leave to the defendant to move to set that verdict aside, and to enter a verdict for him.

Watson, on a previous day in the present Term, obtained a rule nisi in pursuance of the leave reserved, or for a new trial on the ground of misdirection.

Hugh Hill, Hall, and *West* shewed cause.—First, the execution of the assignment of the 2nd of July, 1851, was an act of bankruptcy. The consideration was for a by-

gone and pre-existing debt. The act was secret. The recital of the deed shews that the solvency of the bankrupt was at the time doubtful, and that the transfer was effected in contemplation of bankruptcy. The instrument falls within the 67th section of the Bankrupt Act 12 & 13 Vict. c. 67, as being "a fraudulent transfer of the goods and chattels of the trader with intent to defeat or delay his creditors." The principles expounded in *Graham v. Chapman* (a) apply to this case. *Jervis*, C. J., there says, in delivering the judgment of the Court, "Every person must be taken to intend that which is the necessary consequence of his own act; and if a trader make a deed which necessarily has the effect of defeating or delaying his creditors, he must be taken to have made the deed with that intent. But a deed which has the effect of defeating or delaying a trader's creditors is, by the policy of the Bankrupt Law, a fraudulent deed; and therefore, a deed which has that effect is, in the terms of the Act, a fraudulent transfer of the trader's goods with intent to defeat or delay his creditors." The several cases of *Siebert v. Spooner* (b), *Lindon v. Sharp* (c), *Baxter v. Pritchard* (d), and *Whitwell v. Thompson* (e), are there discussed. The necessary consequence of putting this deed in force would be to stop the bankrupt's business and to bring about insolvency. It is clear that the object of this deed was to prefer the defendant to all the other creditors of the bankrupt, inasmuch as they would be thereby necessarily delayed. The words of the Bankrupt Act are satisfied by evidence that the effect of the transfer is either to defeat or to delay the creditors. [Parke, B.—In *Graham v. Chapman*, the deed transferred the whole of the trader's property. In this case the trader does not transfer a moiety of his effects. I think that no case can be found which goes the length of deciding that

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(a) 21 L. J., C. P., 173.

(b) 1 M. & W. 714.

(c) 6 M. & Gr. 895.

(d) 1 A. & E. 456.

(e) 1 Esp. 68.

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such a transfer is an act of bankruptcy. Lord *Mansfield*, C. J., in *Worseley v. De Mattos* (a), points out the distinction between the two cases. He there says, "There is a great difference between the conveyance of *all* and of a *part*; a conveyance of a part may be public, fair, and honest; as a trader may sell, so he may openly transfer many kinds of property by way of security. But a conveyance of *all* must either be fraudulently kept secret, or produce an immediate absolute bankruptcy." In *Carr v. Burdiss* (b), where the trader assigned the whole of his *stock*, it was held that, in order to constitute an act of bankruptcy, it must be shewn that it would produce insolvency.] It is submitted that, if the inevitable consequence of the deed is to produce insolvency, the deed is an act of bankruptcy.

Secondly, the direction was correct, for it involved the question of insolvency, and must have been understood by the jury. The point in issue was, whether the trader could carry on his business in case the deed was acted upon: *Wedge v. Newlyn* (c), *Porter v. Walker* (d), *Bowker v. Burdekin* (e).

Watson, *Tomlinson*, and *Hamerton* in support of the rule.—They were stopped upon the last point by the Court, who stated that they were clearly of opinion that the direction was wrong; and that they only doubted whether there ought to be a new trial, or whether the verdict should be entered for the defendant, in pursuance of the leave reserved.—This transfer was not an act of bankruptcy. A transfer by deed of a trader's property may be an act of bankruptcy upon either of the two following grounds: first, it is so where the necessary consequence of the instrument itself is to produce insolvency, as, for instance,

(a) 1 Burr. 467.

(b) 1 C. M. & R. 443.

(c) 4 B. & Ad. 831.

(d) 1 M. & Gr. 686.

(e) 11 M. & W. 128.

where the trader thereby transfers the whole of his property, or the greater portion of it, with a mere colourable or trifling exception; and in such case, the intent to defeat and delay the creditors is implied by law. The second class of cases is that where the trader transfers a portion only of his property, but is shewn to have done so with the intent of defeating or delaying his creditors. Now the transfer in question does not fall within either of these classes, for by it the trader does not dispose of even the half of his effects, and there is nothing upon the face of the instrument which, *ex necessitate*, makes it an act of bankruptcy; and his own statement confirms the validity of the instrument in this respect. *Graham v. Chapman* has already been disposed of, as shewn by the Court, upon the ground that the deed there transferred the whole of the trader's effects; and that decision, therefore, falls within the first class of cases above mentioned. Now this transfer does not fall within the second class; for the bankrupt's testimony, which was not disputed, establishes the fact that there was no intention on his part of delaying or defeating his creditors, but, on the contrary, that the deed was executed with a view of obtaining future advances, which at that time he had sufficient capital to meet; and that, but for the failure of other parties, he would not have been disabled from carrying out those intentions: *Gibbins v. Phillips* (a).

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POLLOCK, C. B.—The precise question raised by the rule is, whether the verdict should be set aside, and a verdict entered for the defendant. The following statement appears upon the notes of the Lord Chief Justice:—"Verdict for the plaintiffs, 756*l.* 17*s.* 9*d.*, with leave to the defendant to move to enter a verdict for him, if the Court think there was not evidence to go to the jury of an act of bankruptcy."

(a) 7 B. & C. 529.

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Now, if the learned Judge had thought there was no evidence of an act of bankruptcy, he would not have directed the verdict for the plaintiffs, but he would have given them the option of being nonsuited. I therefore think, that the plaintiffs ought not to be in a worse situation in consequence of the decision at *Nisi Prius* being in their favour, than they would have been if the decision had been against them. The learned Judge also adds, "it seemed to me the deed was a security for an existing debt due from the bankrupt to Waud" (no doubt that is so), "that is, to the extent of 400*l.* of bills then running, and would have enabled Waud next day to have taken possession of all the looms and machinery, whereby the bankrupt's business might have been immediately stopped." The verdict seems to have passed upon the ground that the effect of the deed would, if put in force, be to stop the business of the factory. I am of opinion that such an effect does not of itself make the deed an act of bankruptcy; and, upon considering the evidence in the case, there is nothing to make it an act of bankruptcy. I am satisfied that the direction, that the transfer was an act of bankruptcy for the reason assigned, is not correct in law. If a man's business be that of a carrier, and he sell his horse and cart, but has ample funds to buy another horse and cart, such an assignment is no act of bankruptcy; and so, in the case of an assignment of a man's whole stock, where he has the means of carrying on other business, the assignment is not an act of bankruptcy, although the instrument, by being put in force, stops the business; but the assignment must be such as puts a stop to the business by reason of the party's insolvency. I therefore think the rule ought to be absolute to set aside the verdict and to enter a nonsuit.

PARKE, B.—I am of the same opinion. The first question is, what is the precise point left for our decision by the Lord Chief Justice; and after hearing the arguments,

and after reading his Lordship's notes, I think the question is a very simple one. It is to be assumed that the witness Normanton speaks the truth; and he says he made the assignment in the hopes of obtaining a sale of his goods for cash, by means of getting the bills of Messrs. Brooks & Co. discounted. Now we are to take it on his statement, that this property did not constitute half of his effects, for he says that he had capital to more than double the amount of that which he assigned by the deed. I agree with my Lord Chief Justice as to the construction of the instrument, namely, that it is not to secure future advances, but debts arising out of bills already discounted, which would thereafter become due. The question as to this being a fraudulent assignment to a particular creditor in contemplation of bankruptcy does not arise, for there is no evidence of that sort in the case; and moreover, the testimony of the bankrupt himself is directly to the contrary. Then the facts as found by the jury are simply these: The trader assigns less than half of his property, consisting of the implements of his trade; and the effect of putting that assignment in force is to prevent him from carrying on his trade; and the question is, whether that constitutes an act of bankruptcy. There is no authority which goes the length of deciding that it is. I agree with what was said by one of the learned counsel for the defendant, that if, upon these facts, this were held to be an act of bankruptcy, the decision would do much to shake the law on this subject. I am of opinion that, where there is no fraudulent intent under the statute of Elizabeth, and no intention to give a preference under the Bankrupt Acts, an assignment of less than one half of a trader's property is not made an act of bankruptcy by the additional simple fact, that the transfer, when acted upon, disables the trader from carrying on his trade, without the machinery so transferred. This point was decided by *Carr v. Burdiss*. The law is not that a man commits an act of bankruptcy by disabling

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himself from carrying on his business, but that he commits an act of bankruptcy when the necessary result of that act is to defeat or delay other creditors, who are not the object of that particular conveyance. But there is no authority for saying, that a conveyance, without fraudulent intent, of less than half a man's property, constitutes an act of bankruptcy. Here my Lord did not leave the question to the jury, whether the effect of the assignment of the machinery was to produce insolvency.

Acts of bankruptcy arising from fraudulent assignments are confined to acts of a fraudulent nature under the statute of Elizabeth, with an immediate object to defeat creditors; to such as are fraudulent under the Bankrupt Acts, being made with the object of preventing an equal distribution of the bankrupt's effects under his bankruptcy, which he knows must occur; and lastly, to those where there is a transfer of property, which must necessarily in its results be known to the bankrupt to lead to the delay and disappointment of all the creditors, with the exception of that particular individual to whom the transfer is made. Such a transfer is also an act of bankruptcy, upon the principle that every man is bound to contemplate the necessary result of his own acts. The case upon which reliance has been placed by the learned counsel for the plaintiffs is that of *Graham v. Chapman*, which involved a question of the last description; and though the object of the deed there had no reference to giving up trade, or to the preference of one particular creditor to another, but was executed by the party with a view to obtain advances, and so to carry on his trade, yet inasmuch as that was a conveyance of all the party's property, the Court there held, and very properly so, that the transfer was of itself an act of bankruptcy. That case, therefore, has no application whatever to the present. I think there was no act of bankruptcy here; and that, in pursuance of the leave reserved, the defendant is entitled to the verdict, but,

for the reasons given by my Lord, that a nonsuit should be entered.

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ALDERSON, B.—I am of the same opinion. The object of the deed seems to have been rather to afford a security for the solvency of Messrs. Brooks & Co., than for that of the bankrupt. The course of business appears to have been as follows:—The bankrupt, who was a manufacturer, made and sold goods to Messrs. Brooks & Co., and they paid for those goods by their acceptances. The bankrupt wished to have cash for their bills, and he therefore applied to the defendant to discount them, so as to obtain ready money for his goods. The defendant, entertaining some doubts as to the solvency of Messrs. Brooks & Co., insisted that the bankrupt should give him some security for the discount, so as to secure to him the amount of the acceptances in case of nonpayment by Messrs. Brooks & Co., and for that reason the security was given. If Messrs. Brooks & Co. got into better credit, less would be paid by way of discount; or if they get into worse credit, the bankrupt might continue to deal with them no further. All these are matters which might account for the high rate of interest, and are consistent with the bankrupt's having a reasonable expectation of carrying on the business. The only question here is, whether a security given for such property, on which security the bankrupt did not, at the time he gave it, expect to have to pay anything, for he believed all these bills would be provided for by Messrs. Brooks & Co.,—whether such security, given in respect of less than half his existing property, can be considered as an act of bankruptcy? If we were to hold that it is, we should be going much farther than any case has yet gone, and I do not think we are justified in going to that extent.

PLATT, B.—I am of the same opinion. I agree in what has been stated by my brother *Alderson* with reference to

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the solvency of the parties to the deed. Independently of the testimony of the bankrupt, that the instrument was not executed in contemplation of delaying his creditors, I think there was no evidence of fraud. But the bankrupt's account must be taken as true. He was called by the assignees, and no imputation is cast upon his testimony. He states that he was possessed of upwards of 3000*l.* worth of property, and that he pledged 1500*l.* of it for the purpose of giving security, which was required by the persons who discounted his bills on Messrs. Brooks & Co.; and that the whole of his obligations, including what might fall in with respect to Messrs. Brooks & Co., at that time did not exceed 2900*l.* Such a transfer does not come within the principle of the case where a man assigns the whole of his property, or the whole with a colourable exception, which in point of law is considered as no exception. That being the case, what was the object of this deed? The bankrupt deposes, that his object was to enable him to carry on his trade, and not to delay his creditors; that was not an act of bankruptcy. For these reasons, I think the rule should be absolute to enter a nonsuit.

Rule absolute accordingly.

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ASH *v.* The Honourable P. DAWNAY.

Nov. 23.

TRESPASS for breaking and entering the plaintiff's dwelling-house, and for continuing therein making a disturbance, for a long time, to wit, for seven weeks.

The defendant pleaded, first, not guilty; and secondly, a justification under a writ of testatum *fi. fa.*, issued against the goods of the plaintiff and two others, and directed to the defendant as sheriff of Yorkshire.

To this second plea the plaintiff pleaded, by way of new assignment, that the plaintiff issued his writ, and declared for other trespasses than those sought to be justified by that plea; for that, after the seizure in execution of the plaintiff's goods, and after the expiration of a reasonable time for such seizing and taking in execution and removal, under the writ and warrant, of the said goods and chattels off the said dwelling-house, and for the completion of the purpose for which the said dwelling-house was so entered, the defendant did not depart from the dwelling-house, but, on the several days and times in the declaration mentioned, and after the said goods had been so taken in execution, and after the expiration of such reasonable time as aforesaid, broke and entered the said dwelling-house of the plaintiff, and then made a great noise &c. therein, and continued therein making such noise &c. for a long time, to wit, as in the declaration mentioned, being other trespasses than those pleaded to, &c.

To this new assignment the defendant pleaded, first, not guilty; and secondly, a justification under a writ of testatum *fi. fa.* This plea, after stating that the writ duly issued directed to the defendant as such sheriff, that it was delivered to him, that whilst he was such sheriff he made his warrant directed to one W. P., his bailiff, by which he commanded him to levy the amount of the writ &c. of the goods

A sheriff, who has entered under a writ of *fi. fa.*, and continues on the premises in possession of the goods for more than a reasonable time, is liable in trespass for so continuing beyond the time allowed by law.

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and chattels of the plaintiff, and of two other persons named in the writ; that the said warrant was delivered to W. P.; by virtue of which writ and warrant he peaceably and quietly entered into the said dwelling-house, the outer doors thereof being then open, in order to, and did then, seize and take in execution divers goods and chattels of the plaintiff, for the purpose of levying the monies, &c. The plea then proceeded to state, that the said goods and chattels continued in the said dwelling-house from the time when they were so seized and taken in execution until the defendant levied thereout, as hereinafter mentioned, the monies so directed to be levied &c., and that the said writ, during all the time in the new assignment mentioned, was in full force, unexecuted and not returned, wherefore W. P., so being and as such bailiff, continued and remained in the said dwelling-house, in possession of the said goods and chattels, during the period in the new assignment mentioned, for the purpose of selling the said goods and chattels, and levying thereout, and did, to wit, on &c., levy thereout the said sums of money so directed &c.; and, in so doing, the said W. P. did necessarily make a little disturbance, &c., and did stay and continue making such disturbance for the said space of time, as he lawfully might for the cause aforesaid, doing no unnecessary damage to the plaintiff, which said continuing in the said dwelling-house, after the said goods and chattels had been so seized and taken in execution, until the said monies were so levied thereout, are the said several trespasses above newly assigned, &c.

The plaintiff replied to this plea, (after alleging that the writ and warrant, and the goods &c., and the taking in execution in that plea mentioned, were respectively identical with those mentioned in the second plea to the declaration), that the said continuing and remaining of W. P. in the said dwelling-house of the plaintiff in possession of the said goods, &c., as in the last plea mentioned, and the several other trespasses in and by that plea attempted to be

justified were not, nor was any part thereof, necessary or required for the purpose of selling the said goods and chattels, and levying thereout the said monies &c., or any part thereof, or for otherwise executing the said writ and warrant or either of them, &c.

The defendant rejoined, that the said continuing and remaining of W. P. in the said dwelling-house in possession of the said goods &c., and the said several trespasses attempted to be justified by the last plea, were respectively necessary and required for the purpose of selling the said goods &c., and levying thereout the monies &c.—Issue thereon.

At the trial, before Lord *Campbell*, C. J., at the last Yorkshire Assizes, the plaintiff obtained the verdict, with 5*l.* damages.

In the present Term, a rule nisi was obtained to arrest the judgment, on the ground that the form of action was misconceived.

Watson and *Kemplay* shewed cause.—First, the writ of *fi. fa.* directs the sheriff to seize the goods, and to sell them. He is also authorised by the writ to enter upon the premises where the goods are, and to remain there for a reasonable time. This is an authority collateral to the writ: *Kerbey v. Denby* (a). If he remain there for an unreasonable time, he becomes a trespasser. It is unnecessary to contend that he becomes a trespasser ab initio. The duration of the period which is to be considered as reasonable, is a question for the jury, and it becomes defined by their verdict. The case is reduced to the following simple question: a party has a license granted him to remain upon the licenser's premises a certain time, say for one day, but he continues for twenty; has he any justification for the nineteen days? The form of the plea shews

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(a) 1 M. & W. 336.

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that the sheriff is only justified during a reasonable time. *Winterbourne v. Morgan* (a) is an authority that, where a party enters under a warrant of distress, and continues on the premises beyond the time allowed by law, he becomes a trespasser. *Playfair v. Musgrove* (b) is also expressly in the plaintiff's favour. That was an action of *trespass* against the sheriff, who had entered upon the plaintiff's premises under a writ of *fi. fa.*, for remaining there for more than a reasonable time; and the defendant was held to be a trespasser. *Peppercorn v. Hofman* (c) is an additional authority in favour of this form of action. The question there was, whether the defendant had staid upon the plaintiff's premises for an unreasonable time for the execution of a warrant. [Parke, B.—In *Davis v. Capper* (d), trespass was held to lie against a magistrate for committing a party charged with felony for re-examination for an unreasonable time, but without any improper motive.] *Ladd v. Thomas* (e) is another authority for the plaintiff. In the cases which will be relied upon by the defendant, the writ directed the performance of the act complained of, and the writ was running at the time; and therefore trespass was held not to be the proper form of remedy, inasmuch as the alleged wrongful act was covered by the writ. *Salmon v. Percivall* (f) is a case of that description. There the defendant justified under a writ of *ca. sa.*, and the Court held, that he was not liable in trespass for detaining the plaintiff in custody after tender of bail. *Smith v. Eggington* (g) is substantially a similar decision. So, in *Shorland v. Govett* (h), the writ was running at the time the wrongful act was committed. Upon these grounds, the following cases are also distinguishable from the present:

- (a) 11 East, 395.
 (b) 14 M. & W. 239.
 (c) 9 M. & W. 618.
 (d) 10 B. & C. 28.

- (e) 12 A. & E. 117.
 (f) Cro. Car. 196.
 (g) 7 A. & E. 167.
 (h) 5 B. & C. 485.

Aldred v. Constable (a), *De Medina v. Grove* (b), *Crosier v. Pilling* (c). But, if the sheriff, after he has been directed by the plaintiff not to execute a writ of ca. sa., nevertheless does so, he becomes a trespasser; so also, if he detain the defendant after notice from the plaintiff that he has released the debt: *Barker v. St. Quintin* (d).

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Secondly, although it appears from these pleadings that the original trespass was committed under the writ of fi. fa., it does not appear that the continuing trespasses were committed under the writ. Such trespasses give a fresh right of action; and, although an objection might have been taken to the pleadings at a previous stage of the proceedings, on the ground of a departure, yet that objection is too late on motion in arrest of judgment. The pleadings, therefore, as they stand, shew a good cause of action in trespass: *Lee v. Raynes* (e).

Hugh Hill and *W. S. Cross* in support of the rule.—The sheriff is not a trespasser in this case. If a sheriff, in the execution of a writ, continues upon the premises in possession of the goods beyond a reasonable time, he does not become a trespasser, although he may be liable in an action on the case. *Playfair v. Musgrove*, upon which so much reliance has been placed, proceeded upon the meaning of the word "sold," and that case merely decided, that, at the time the grievance was committed, the premises in question were the plaintiff's. Now an execution is of a continuing nature: *Crowther v. Ramsbottom* (f), and a mere irregularity in the course of the execution does not make the officer a trespasser ab initio. Trespass does not lie for an excessive distress: *Lynne v. Moody* (g). If the precise time during which the sheriff might continue on the

- (a) 6 Q. B. 370.
- (b) 10 Q. B. 152.
- (c) 4 B. & C. 28.
- (d) 12 M. & W. 441.

- (e) Sir T. Raym. 86.
- (f) 7 T. R. 654.
- (g) 2 Stra. 851.

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premises were fixed by the statute, the case might be different. In *Aitkenhead v. Blades* (a) it was held, that where a sheriff continued in possession after the return-day of the writ, that irregularity made him a trespasser ab initio, but that it would not support the allegation of a new trespass committed by him after the acts which he justified under the execution; and Lord *Mansfield*, C. J., there said: "What mortal can tell when the trespass began, and when the rightful occupation of the sheriff ceased? In the case in 11 East, (*Winterbourne v. Morgan* (b)), the period of five days allotted by the statute 2 Will. & Mary, st. 1, c. 5, for selling a distress, make the continuance on the premises after that time clearly a new trespass; but here, who can tell when the new trespass began?" In *Whitworth v. Clifton* (c), *Parke*, B., held, that a sheriff who executed a writ of fi. fa. after notice that the defendant had obtained his discharge under the Insolvent Debtors Act, was not a trespasser.—They also cited *Lucas v. Nockells* (d), *Yearsley v. Heane* (e), *Ewart v. Jones* (f), *Tarlton v. Fisher* (g), and *Belcher v. Magnay* (h).

POLLOCK, C. B.—I am of opinion that this rule ought to be discharged. The argument has been somewhat a lengthened one; but the question is very simple, viz. whether a sheriff, who continues an unreasonable time upon the premises in executing a writ of fi. fa., is liable in trespass. The case of *Playfair v. Musgrove*, in which this very point was expressly taken, is a decision that under these circumstances trespass will lie.

PARKE, B.—I am of the same opinion. There are many authorities to the effect that trespass lies. The writ of fi.

(a) 5 Taunt. 198.

(b) 11 East, 395.

(c) 1 Moo. & Rob. 531.

(d) 10 Bing. 157.

(e) 14 M. & W. 322.

(f) 14 M. & W. 774.

(g) 2 Doug. 677.

(h) 12 M. & W. 102.

fa. impliedly authorises the sheriff to enter the premises for the purpose of seizing the goods, and to remain there for such time as is reasonably necessary for the execution of the writ. That is an authority given him by law; but if he remains for more than a reasonable time he cannot justify it. In that case he is in the position of a man who walks into another man's house without any authority, and who is therefore a mere trespasser; and staying in the house for more than a reasonable time appears to me to be the same thing. The objection, that there is a difficulty in defining what a reasonable time may be, would equally apply, if the action were *case* instead of trespass. In *Davis v. Capper*, to which I have already referred, trespass was held to lie against the magistrate; and the Court said, that the reasonableness of the time was a question for the jury, and that, whether the commitment was considered as absolutely void from the beginning as being for an unreasonable time, or as void *pro tanto* or for so much of the time as was unreasonable, still that an action of trespass would be maintainable, inasmuch as every continuance of a party in custody is a new imprisonment and a new trespass. The remedy for an excessive distress for rent is not analogous to the present case, as the action is founded upon the Statute of Marlbridge.

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ALDERSON, B., concurred.

PLATT, B., (after stating the pleadings proceeded:)—
 The sheriff is only justified in continuing upon the premises for such time as is reasonably necessary for the due execution of the writ of fi. fa. There can be no doubt that, if he remains beyond such reasonable time, he has no justification whatever in law, but becomes a mere trespasser.

Rule discharged.

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Nov. 25.

WATERS v. HOWELLS.

To an action of trespass, in which the declaration contained five counts, the defendant pleaded not guilty and not possessed; upon which issues were joined; the plaintiff obtained a rule for a special jury. The defendant, before the trial, withdrew his pleas to the two last counts, and suffered judgment by default upon them. The cause was tried by a special jury, and the plaintiff obtained a verdict upon the general issue, but the defendant on the plea of not possessed to the three first counts, and the damages were assessed at 40s. on the other counts. The Judge certified for a special jury:—*Held*, that the plaintiff was not entitled to the costs of the special jury.

THIS was a rule calling on the plaintiff to shew cause why the Master should not review his taxation, by disallowing the plaintiff his costs of a special jury. It was an action of trespass quare clausum fregit. The declaration contained five counts for trespasses on different closes of the plaintiff. The defendant pleaded, first, not guilty to the three first counts, and secondly, not possessed to those counts. He also pleaded similar pleas to the two last counts. After issue joined, the plaintiff obtained a rule for a special jury, which was nominated, and a rule was also obtained for the jury to view the locus in quo. A short time before the trial, the defendant obtained leave to withdraw his pleas to the two last counts of the declaration, and as to them suffered judgment to go by default. At the trial, before *Martin*, B., at the last Carmarthen Assizes, a verdict was found for the plaintiff, upon the issues raised by the plea of not guilty to the three first counts, but for the defendant upon the issues raised by the plea of not possessed to these counts; and the damages were assessed at 40s. on the other counts.

The plaintiff applied for and obtained a certificate for a special jury.

Field shewed cause.—The plaintiff is entitled to the costs of the special jury. The plaintiff obtained 40s. damages. [*Parks*, B.—The plaintiff lost the verdict on the trial of the cause. The special jury merely assessed the damages on the counts upon which the defendant allowed judgment to go by default.] The cause was properly tried by the special jury. In *Haldane v. Beauchlerk* (a) the de-

(a) 3 Exch. 658.

fendant obtained a rule for a special jury, which was nominated and struck, but no special jury process issued, and the cause was tried by a common jury as undefended, and the Court set aside the trial with costs. [*Pollock*, C. B.—The plaintiff lost the cause. By the terms of the statute, the special jury are to try the *issues*, that is to say, they are to try the cause.] *Vickers v. Gallimore* (a) was an action of trespass *quare clausum fregit*, to which the defendant pleaded not guilty, and a justification under a right of way. The plaintiff joined issue on not guilty, and traversed the right of way; upon which replication issue was joined, and he new assigned, and the defendant suffered judgment thereon by default. At the trial the plaintiff obtained a verdict, with nominal damages, on the plea of not guilty, and 40s. on the new assignment; but the defendant obtained a verdict on the plea of justification: and it was there held, that the plaintiff was entitled to the general costs in the cause. [*Parke*, B.—There the defendant, by not withdrawing the general issue from the record, left an issue to be tried. It used to be the practice, where there was a new assignment, to withdraw the general issue as to the trespasses newly assigned, in order to avoid the consequence of having to pay the costs. I pointed that out in *Probert v. Phillips* (b), in stating the ground upon which the case of *Broadbent v. Shaw* (c) proceeded.]—He referred to 1 Saund. 300 c, note.

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Gray, in support of the rule, was not called upon.

POLLOCK, C. B.—I am of opinion that the rule must be absolute.

PARKE, B.—It appears from Dax's Masters' Practice, p. 126, that a case has been decided in this Court upon the taxation of costs, which is exactly in accordance with

(a) 5 Bing. 196. (b) 2 M. & W. 41. (c) 2 B. & Ad. 940.

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our present decision. That case was as follows:—"Where, upon a trial, the plaintiff succeeded on certain issues, and the Judge certified for a special jury, and afterwards the matter was turned into a special case, and on the argument certain special pleas were found for the plaintiff, but the defendant succeeded on the plea of the Statute of Limitations, which went to the whole action; the Master allowed the plaintiff the costs of the special jury, the Judge having certified in the usual way at the trial. The allowance was made, partly on the ground that the issues eventually found for the plaintiff were of a special nature, and partly because the certificate had not been rescinded. The Master was directed to review his taxation, and to disallow the plaintiff the costs of the special jury." That case is precisely similar to the present. Here the plaintiff lost the cause, and the special jury merely performed the functions of a common jury by assessing the damages upon those counts, upon which the defendant had suffered judgment to go by default.

MARTIN, B.—I am of the same opinion. At the time I granted the certificate, it struck me that it was a very doubtful matter whether the plaintiff was entitled to the costs of the special jury.

Rule absolute.

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PALMER v. TROWER, Administrator.

Nov. 6.

ASSUMPSIT.—The first count of the declaration was on a joint and several promissory note, made by the father and grandfather of the defendant, who was sued as the administrator of his grandfather.—Plea, non fecit.

There was a second count for professional services rendered by the plaintiff as a solicitor, to which the defendant pleaded non assumpsit.

At the trial, before *Pollock*, C. B., at the last Norfolk Assizes, the claim which was the subject-matter of the second count was not disputed; but the defence set up to the promissory note was, that the plaintiff had forged the note, by converting an old satisfied promissory note of the same date, and made by the same parties, for 7*l*., into one for 20*l*., by altering the word "seven" into "twenty," and by inserting the figures "20*l*." in the corner of the note. The defence further imputed to the plaintiff, that he had forged another note for 7*l*., in order to cover the forgery of the 20*l*. note. The second note was also produced at the trial. It appeared that a charge had been preferred against the plaintiff for the forgery before the magistrates, but that the charge had been dismissed. The defendant was examined as a witness, and was asked, on cross-examination, whether his father had not, after the charge was preferred against the plaintiff, said in his presence, that "he was sorry he had forgotten that he had signed two notes." The defendant answered in the negative, and the plaintiff's counsel then proposed to call a third party, in whose presence the father had made the statement, for the purpose of shewing that the father had made the statement and that the defendant had heard it. The learned Judge, however, was of opinion that this evidence was in-

In an action upon a joint and several promissory note professed to be made by A. & B., the defendant being the administrator of A.; the defence set up was, that the plaintiff had forged the note and another note also, and the defendant was asked on cross-examination, whether he had not heard B. say after the case had been before the magistrates, when a charge of forgery with reference to the note was preferred against the plaintiff, that "he, B., was sorry he had forgotten he had signed two notes." The defendant answered in the negative:—*Held*, that another witness could not be called to shew that he was present at the time, and that B. had made the statement.

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admissible, and rejected it. A verdict was found for the defendant.

O'Malley now moved for a new trial, on the ground that this evidence was improperly rejected, and also upon affidavits.—The evidence tendered was both material to the issue, and also was material as destructive of the testimony of the defendant. It went to his credibility. [*Alderson*, B.—The issue sought to be raised is purely collateral. It is a statement made in the presence of the defendant of a fact not within his own knowledge; if it had been made in the presence of the grandfather, who is represented by the defendant, the case might have been different. *Pollock*, C. B.—I consulted my Brother *Parke*, who was at the time presiding in the other Court; he was clearly of opinion that the evidence was not admissible.]

PER CURIAM (a).—Upon this point there will be no rule.

Rule refused (b).

(a) *Pollock*, C. B., *Alderson*, B.,
Platt, B., and *Martin*, B.

(b) See *Attorney-General v. Hitchcock*, 1 Exch. 91.

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In the Matter of a Plaintiff of *CHEW v. HOLBOYD* and
Another.

Nov. 25.

THIS was a rule calling on the plaintiff, and the Judge of the County Court of Macclesfield, to shew cause why a writ of prohibition should not issue, directed to the Judge of the said County Court, to prohibit all further proceedings in this cause.

It appeared from the affidavits, that the plaintiff was issued to recover damages from the defendant for breaking and entering certain apartments of the plaintiff in a cottage situate at Chorley, in Cheshire, and for removing the furniture, and for expelling the plaintiff from the apartments. At the trial of the plaintiff, it appeared that the plaintiff was the owner of the cottage in question; and the plaintiff's case was, that he had let the defendant Holroyd a portion of the cottage, but had retained the rest for himself with the furniture. Some days after this alleged arrangement had been come to, Holroyd and the other defendant, who was his servant, broke into the other part of the cottage, and removed the furniture into a neighbouring shed. It further appeared that, upon possession being demanded of the defendants, Holroyd replied, that he had taken the whole of the cottage, and that he would keep it till his time was out.

On the trial of a plaintiff for a trespass committed by breaking the doors of certain rooms in a cottage of the plaintiff, the plaintiff's case was, that he had let the defendant a portion only of the cottage, and had reserved to himself the rooms in which the trespass was committed. The defendant's case was, that the plaintiff had let him the whole of the cottage:—*Held*, that title to a corporeal hereditament was in dispute under the 58th section of the 9 & 10 Vict. c. 95, and that the County Court had no jurisdiction over the plaintiff.

On the part of the defendants, it was objected, that title to a corporeal hereditament was in question, and therefore that the County Court was ousted of its jurisdiction by the 58th section of the 9 & 10 Vict. c. 95. The Judge of the Court overruled the objection, and the cause proceeded, and the plaintiff obtained a verdict with 25*l.* damages. On a preceding day in this Term the present rule had been obtained.

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Hugh Hill (*Wheeler* with him) shewed cause.—The question turns upon the proviso contained in the 58th section of the 9 & 10 Vict. c. 95, which enacts, that the County Court “shall not have cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments &c. shall be in question.” And the question is, whether the present case is taken out of the jurisdiction of the County Court, as being an action in which the title to an hereditament is disputed. It is submitted, that the word “hereditament” implies something which is capable of being inherited, and that a mere dispute with reference to occupation is not sufficient to oust the jurisdiction of the County Court. [*Parke*, B.—The language of the statute plainly prohibits the Judge of the County Court from determining matters where the title to corporeal or incorporeal hereditaments is in question.] In *Lloyd v. Jones* (a), it was held that, in order to oust the jurisdiction of the County Court, the claim set up must be a *bonâ fide* one; and *Wilde*, C.J., there observes, that the word hereditament is defined in the text books to signify “all such things, whether corporeal or incorporeal, which a man may have to him and his heirs by way of inheritance, and which, if they be not otherwise bequeathed, come to him which is next of blood, and not to the executors or administrators, as the chattels do.” There is no doubt that, where the Judge has jurisdiction over the question of fact, and has given his decision, that decision cannot be disturbed by this form of remedy: *Fearon v. Norvall* (b). [*Parke*, B.—In *Lloyd v. Jones* (a), the objection to the jurisdiction of the County Court was founded upon a pretended custom which the Court held to have no valid existence; and the Lord Chief Justice also says, “But further, supposing any question could arise in the cause regarding the alleged custom, still that circumstance would not bring the cause within any of

(a) 6 C. B. 81.

(b) 5 D. & L. 439.

the classes, the jurisdiction of the County Court over which is excluded by the 58th section referred to; inasmuch as that section excludes the jurisdiction in causes involving disputed claims to incorporeal hereditaments, and the claim in question is not an incorporeal hereditament." The word hereditament merely defines the nature of the thing itself.] The question of title did not arise; it was for the Judge to say whether the title came in question: *Thompson v. Ingham* (a); and if upon the evidence he was wrong, that would be good ground for a prohibition. [Parke, B. That case decided, that the Judge cannot give himself jurisdiction by his decision; if he could do so, he might give himself jurisdiction to any extent.] If the proviso in the 58th section is applicable to every case in which it appears that any interest in a corporeal or incorporeal hereditament is in dispute, it must be admitted that the County Court had not jurisdiction here.

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Cowling, in support of the rule, was not called upon.

PER CURIAM (b).—The rule must be absolute. The case is clear.

Rule absolute.

(a) 1 L. M. & P. 216.

(b) *Pollock*, C. B., *Alderson*, B., *Platt*, B., and *Martin*, B.

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IN THE EXCHEQUER CHAMBER.

(In Error from the Court of Exchequer).

Nov. 29.

CLARKE v. GANT.

All the overseers, whether churchwardens or not, must sign the "Burgess List," required by the 15th section of the Municipal Corporation Act 5 & 6 Will. 4, c. 76.

A declaration for a penalty under the 48th section of that Act stated, that the defendant was an overseer, and that it was his duty, as such overseer, to make out and sign a list of all persons entitled to be on the burgess roll, and that he unlawfully neglected so to do:—*Held*, that, after verdict, the declaration was good, although it did not aver that there were any persons entitled to have their names on the list. Whether the declaration would have been good on special demurrer—*Quære*.

ERROR on a bill of exceptions.—The action was debt, to recover the penalty of 50*l.* under the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, s. 48. The declaration stated, that the defendant, before and at the time of the neglect and refusal thereafter mentioned, to wit, on the 5th of September, 1851, was one of the overseers of the poor of the parish of Dovercourt in the borough of Harwich, in the county of Essex, and that it was the duty of the defendant as such overseer, and of the other overseers of the poor of the said parish, to make out on the day and year aforesaid an alphabetical list of the burgesses of the said borough in the said parish, that is to say, of all persons who should be entitled to be enrolled in the burgess-roll of the said borough of that year, according to the provisions of the statute in such case made and provided in respect of property within the said parish, and that the defendant, as such overseer, ought to have signed such borough list, and to have delivered the same so signed to the town clerk of the borough aforesaid; yet the defendant, not regarding his duty, &c. did not then, or at any time before or since, make out, sign, and deliver such burgess list as aforesaid, but unlawfully neglected so to do, contrary to the form of the statute; whereby and by force

of the statute, the defendant hath forfeited the sum of 50*l.*: *actio accrevit, &c.*—Plea, *nil debet*; upon which issue was joined.

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At the trial, before *Coleridge, J.*, at the Essex Spring Assizes, 1852, the plaintiff gave in evidence that, on the 5th of September, 1851, the defendant was one of the churchwardens of the parish of Dovercourt in the borough of Harwich, in the county of Essex, and that he did not on that day make out, or sign, or deliver to the town clerk of the said borough any alphabetical list of all persons who were then entitled to be enrolled in the burgess-roll of the said borough of that year in respect of property within the parish, but had omitted so to do. That, on the 5th of September, 1851, an alphabetical list, purporting to be a list of all persons entitled to be enrolled on the burgess-roll of the said borough in that year in respect of property within the said parish, was made out and signed, and delivered by the overseers of the poor appointed under and by virtue of the 43 Eliz. c. 2, s. 1, to the town clerk of the said borough, although the defendant had not joined in making and signing or delivering such list. Whereupon the defendant's counsel objected, that the evidence so given did not maintain the issue.

The learned Judge told the jury, that there was evidence to prove that the defendant was such overseer as in the declaration alleged; and that it was the duty of the defendant, as such overseer, to make out such list as in the declaration mentioned; and that the defendant, as such overseer, ought to have signed such list, and to have delivered the same so signed to the town clerk of the borough; and that the defendant had unlawfully neglected to make out, sign, and deliver such list; and that the issue aforesaid ought to be found for the plaintiff: whereupon the jury found a verdict for the plaintiff.

The defendant's counsel tendered a bill of exceptions to the above ruling; and having assigned error thereon,

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and also error in the judgment, the case was now argued by

Shee, Serjt., for the plaintiff in error (*a*).—First, under the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, it is not necessary that the churchwardens should make out and sign “the burgess list,” but it is sufficient if it be done by the overseers. Section 9 of that Act provides, that certain inhabitant householders within a borough shall be burgesses. By section 11, occupiers of houses, &c. may claim to be rated to the relief of the poor. Section 15 enacts, “that on the 5th day of September in every year the *overseers* of the poor of every parish, wholly or in part, within any borough, shall make out an alphabetical list, to be called ‘The Burgess List,’ according to the form number 1 in the schedule (D) to this Act annexed (*b*), of all persons who shall be entitled to be enrolled in the burgess-roll of that year, according to the provisions of this Act, in respect of property within such parish; and the *overseers* shall sign such burgess lists, and shall deliver the

(*a*) Before *Coleridge, J., Maule, Erle, J., Williams, J., Talfourd, J., J., Creswell, J., Wightman, J., and Crompton, J.*

(*b*) SCHEDULE (D).

No. 1.

The List of Burgesses of the Borough of —, in the Parish [*or Township*] of —.

| <i>Christian Name and Surname of each Person at full length.</i> | <i>Nature of the Property rated.</i> | <i>Street, Lane, or other Place in this Parish [<i>or Township</i>] where the Property is situated, for which he is now rated.</i> |
|--|--------------------------------------|--|
| Aahton, John . . . | Shop . | No. 23, Church-street. |
| Bates, Thomas . . . | House . | Brook's Farm. |

(Signed) A. B. { Overseers of the said
 C. D. { Parish [*or Township*].

same to the town clerk of the borough," &c. That form in the schedule indicates the intention of the legislature that the signatures of the two overseers should be sufficient, otherwise they would have provided for the names of the churchwardens also. The 48th section imposes a penalty, "if any *overseer* of any parish, wholly or in part within any borough, shall neglect or refuse to make out, sign, and deliver such list," &c. By the interpretation clause (section 142), "the words 'overseers of the poor,' shall be construed to mean all persons who execute the duties of overseers of the poor." The other side rely on the 43 Eliz. c. 2, s. 1, which enacts, "that the churchwardens of every parish, and four, three, or two substantial householders there" &c., to be nominated under the hand and seal of two or more justices, "shall be called overseers of the poor of the same parish." But in subsequent statutes, and even in the statute of Elizabeth itself (sections 2, 3, 4, 5), churchwardens are treated as distinct from overseers. The 13 & 14 Car. 2, c. 12, s. 1, uses the words "upon complaint made by the churchwardens or overseers of the poor of any parish." Similar language is found in the 3rd and 8th sections of that Act. The distinction between churchwardens and overseers is again adverted to in the 8 & 9 Will. 3, c. 30, ss. 1, 2. In common parlance churchwardens are not spoken of as overseers. The duty imposed is not only to make out and sign but also to deliver the lists to the town clerk; and, as the latter part may clearly be performed by one overseer for the others, in like manner the requisites of the statute may be complied with by two overseers signing for themselves and the others.

Secondly, the declaration is bad. It does not state any circumstances which would render it necessary that a burgess list should be made out and signed, inasmuch as it contains no allegation that there were any persons so qua-

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lified as to be entitled to have their names inserted on the burgess list. This, being a penal enactment, ought to receive a strict construction.

Lush, for the defendant in error.—First, as to the construction of the statute. Coupling the 15th section with the 48th, and referring to the form in the schedule, it is manifest the legislature intended that the burgess list should be signed by *all* persons holding the office of overseer. In *King v. Burrell*(a), it was argued that the signature of the majority was sufficient; but the Court held otherwise; and *Patteson, J.*, refers to the language of the 48th section, as shewing that all must sign. Churchwardens are overseers within the definition of the interpretation clause (sect. 142); and, furthermore, they are constituted overseers by the 43 Eliz. c. 2, s. 1. Both churchwardens and overseers must join in making a rate and administering relief to the poor; and for that reason the statute requires that they should also join in signing the burgess list. The 4 & 5 Will 4, c. 76, s. 72, uses the term “overseers” only; but that has been held to include churchwardens: *Regina v. The Justices of Cambridge*(b).—Secondly, the objection to the declaration is cured by the verdict. The jury could not have found for the plaintiff unless it had been proved that there were some persons entitled to have their names on the burgess list, and that the defendant had neglected to insert them. The declaration in *King v. Burrell* was in the same form, and this objection was not raised.

Shee, Serjt., replied.

MAULE, J.—We are all of opinion that the exceptions cannot be sustained. The statute requires—for reasons which, though not specified, may be conjectured—that all

(a) 12 A. & E. 460.

(b) 7 A. & E. 480.

the overseers, whether churchwardens or not, should sign the lists; and we are bound by the plain language of the Act. With respect to the declaration, we agree with Mr. *Lush*, that, after verdict, it must be assumed that the defendant neglected to sign the list under such circumstances, with regard to the existence of burgesses, as rendered it incumbent for the jury, under the direction of the learned Judge, to find a verdict for the plaintiff below. As to what might have been the result if the declaration had been specially demurred to, it is unnecessary to give an opinion; it is enough to say, that, in the present state of the record, the objection is not open.

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Judgment affirmed.

LORD HENNIKER v. THE ATTORNEY-GENERAL.

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THIS was a writ of error on the judgment of the Court of Exchequer in the case of *The Attorney-General v. Lord Henniker (a)*.

A testator, by will, directed a settlement of his estates to be executed, containing a power for the tenant for life, by deed or will, to charge the estates with an annuity for the benefit of his wife. The donee, by his will, in execution of that

Hoggins now argued for the plaintiff in error (b).—The rent-charge created by John Minet Lord Henniker was in consideration of the extinguishment of his wife's dower, consequently it was not a gift but matter of contract, and she took as a purchaser. In *Blower v. Morret (c)*, where

power, charged the estates with the payment of the annual sum of 2000*l.* to his wife during her life *in lieu, bar, and satisfaction of her dower*, which she accepted:—*Held*, in the Exchequer Chamber, affirming the judgment of the Court of Exchequer, that this annuity was "a gift," subject to legacy duty under the 45 Geo. 3, c. 28, s. 4, and not a purchase for a valuable consideration.

(a) 7 Exch. 331.

Erle, J., Williams, J., Talfourd, J.,

(b) Before *Coleridge, J., Maule,*

Crompton, J.

J., Cresswell, J., Wightman, J.

(c) 2 Ves. sen. 420.

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the question was, whether on default of assets pecuniary legacies abate in proportion, notwithstanding a direction in the will that they are to be paid "in the first place," Lord *Hardwicke*, C., points out the distinction between a mere legacy and a gift of money in satisfaction of dower, which, he observes, is a purchase from the wife. *Davenhill v. Fletcher* (a) is an authority to the same effect. It was argued in the Court below, that, under the will of 1821, no authority was given to the tenant for life to grant a rent-charge in lieu of dower; and further, that although the grant was for a valuable consideration, yet the power when exercised resulted in a gift upon which legacy duty attached. That, however, is not so. If the power had been exercised by deed after marriage, and in consideration of the relinquishment of dower of equal amount with the rent-charge, no legacy duty would have been payable. It was conceded in the Court below, that if the condition had been annexed by the donor of the power, that would have raised a question of some difficulty; but the Court adopted the argument, that, as the will merely gave a power to charge, the party taking the legacy took it as a gift of the original testator. But the legacy must be taken with all its incidents; and if this is a valid execution of the power, the case is the same in principle as if the donor had himself annexed the condition to the gift. It is not a power to make a gift, but a power to create a charge, which may result in a gift for want of consideration. Thus, if the wife had no dower, according to the authority of *The Attorney-General v. Pickard* (b), she would take the annuity as a gift. The language of the 45 Geo. 3, c. 28, s. 4, applies only to what is strictly speaking "a gift," viz. a donation without any equivalent.

Sir *W. P. Wood* (*Phinn* with him) appeared to argue for the defendant in error, but was not called upon.

(a) Amb. 244.

(b) 3 M. & W. 552; in error, 6 Id. 348.

COLERIDGE, J.—We are all of opinion that the legacy duty is payable. The authority of *The Attorney-General v. Pickard* is not disputed; and consequently, supposing that in the execution of this power no reference had been made to the extinguishment of dower, this annuity would clearly have been a legacy within the 45 Geo. 3, c. 28, s. 4, since it would have been “a gift ‘by will,’ charged upon and payable out of real estate.” Then it is argued, that we must engraft into the power created by the first will the terms as to the extinguishment of dower, which the donee of the power has chosen to impose; and so reading it, the case resembles *Blower v. Morret*. We need not at present determine how far, supposing the position could be maintained, that case would govern this. Several members of the Court entertain a strong opinion that, even in that point of view, this could not be considered as a purchase, but only as a legacy, with a condition annexed to the receipt of it. However, in the view taken by the Court below we all agree. The power itself must be looked at, since all flows from the power; and whatever Lady Henniker took, she took under the power. The donee had no right to engraft any terms upon the power, and what he did was in the nature of a condition annexed to a legacy, and she took it as the gift of the original testator. We think that the view taken by the Court below was correct, and that their judgment ought to be affirmed.

Judgment affirmed.

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WESSON v. ALLCARD.

Held, in the Exchequer Chamber, affirming the judgment of the Court of Exchequer, that a certificate granted by a Commissioner in bankruptcy to a petitioning trader under the 221st section of the 12 & 13 Vict. c. 106, is binding on those persons only who were creditors at the time of the petition and had notice of the sittings of the Court, as required by the Act. Therefore, where a petitioning trader, being the acceptor of a bill of exchange, gave the requisite notice to the drawer of the bill, whom he supposed to be the holder, the certificate was held invalid against an indorsee without notice, who was in truth the holder, notwithstanding the trader had no means of ascertaining that act.

THE defendant having brought a writ of error on the judgment of the Court of Exchequer in *Allcard v. Wesson* (a), the case was now argued by

Watson for the plaintiff in error (b).—The Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106), provides three modes by which a trader subject to the bankrupt law may be discharged from his debts. First, by a fiat in bankruptcy, which ends with a certificate of conformity, which certificate is a bar to the recovery of all debts proveable under the fiat, and precludes all question as to the correctness of the antecedent steps. The second mode is by arrangement between the debtor and his creditors, under the superintendence and sanction of the Court. In that case, certain notices and meetings of creditors are required, and the proposal of the trader must be adopted by a resolution of the majority of creditors, and then the Commissioner is authorised to grant a certificate, which is to have the same operation as a certificate of conformity in bankruptcy. The third mode is by arrangement by deed, and that is ineffectual unless the requirements of the statute are strictly complied with. The present case ranges under the second head: and one objection taken to the plea is, that it does not state that any notice of the first private sitting was given to the plaintiff. But the 221st section renders the certificate a bar to the plaintiff's claim, even though he has not received the requisite notice. Where the legislature intended that the certificate should operate against those creditors only who had notice, it is so ex-

(a) See 7 Exch. 753, where the pleadings and sections of the statute are set out.

(b) Before *Coleridge, J.*, *Cress-*

well, J., *Maule, J.*, *Wightman, J.*, *Erle, J.*, *Williams, J.*, *Talfourd, J.*, and *Crompton, J.*

pressed, as in the 225th section, relating to arrangements by deed, which declares that "no creditor who shall not have had fourteen days notice of any intended application for such order or certificate as aforesaid shall be bound thereby." The 6th section constitutes the Court of Bankruptcy a Court of record. By section 12, the Court has superintendence and control in all matters of bankruptcy, subject to an appeal to one of the Vice-Chancellors, whose decisions and orders are, by the 16th section, subject to an appeal to the Lord Chancellor. If, therefore, the Commissioner has granted this certificate under a mistake as to the law, or upon insufficient grounds in point of fact, the proper course is to appeal. The effect of the certificate appears from the enactments as to the certificate of conformity (sections 198 to 207). By section 200, the certificate of conformity (subject to the provisions of the 201st and 202nd sections) discharges the bankrupt "from all debts due by him when he became bankrupt, and from all claims and demands made proveable under the bankruptcy." By the 205th section, a bankrupt, after allowance of his certificate, may plead that the cause of action accrued before he became bankrupt, "and such bankrupt's certificate shall be sufficient evidence of the trading, bankruptcy, fiat, or petition for adjudication, and other proceedings precedent to the obtaining such certificate." The 207th section declares that the allowance of the certificate, except in case of appeal, shall be final and conclusive. Therefore, whether the proceedings are regular or not, the certificate, being once granted by a Court of record, and not appealed against, becomes conclusive with respect to the antecedent steps, and evidence of all matters necessary to constitute jurisdiction. The certificate under the 221st section is to have the same operation, "to all intents and purposes, as fully as if the same were a certificate of conformity under a bankruptcy;" and consequently it is a discharge from all debts due or becoming due at the time of filing the petition. Great hardship might ensue from

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a contrary construction of the statute, since the trader might not be able to ascertain who was the holder of a bill of exchange.—He cited *Thomas v. Hudson* (a), *Heslop v. Baker* (b).

It is further objected, that the plea is bad for want of an averment "that the resolution or agreement has been carried into effect, and that the creditors of the trader have been satisfied." But the Commissioner is bound, before he grants the certificate, to determine whether the requisitions of the statute have been fulfilled; and the certificate, when granted, is also conclusive as to that fact. *Levy v. Horne* (c) has no bearing on this question, for that was the case of a certificate of protection from arrest under the 216th section. This certificate cannot operate as a certificate of conformity under a bankruptcy, if the creditors are allowed to dispute the antecedent steps. [*Maule, J.*—Might not a plaintiff reply fraud, so as to bring the case within the exceptions of the 221st section?] It is conceded that he might. [*Maule, J.*—Then, reading the 221st and 223rd sections together, the latter shews that the Commissioner may inquire whether any of the debts have been contracted by fraud, for in such case he is empowered to adjudge the petitioner a bankrupt. If the creditor omits that opportunity, then by replying fraud the certificate is rendered inoperative only as to the particular debt to which it is pleaded.]

Hugh Hill (*Hawkins* with him) for the defendant in error.—The plea ought to have shewn affirmatively facts sufficient to give the Court of bankruptcy jurisdiction: *Christie v. Unwin* (d), *Brancker v. Molyneux* (e). These provisions, which enable a portion of the creditors to bind the rest by a private arrangement with the debtor, must

(a) 14 M. & W. 353; in error,
 16 Id. 885.
 (b) 7 Exch. 740.

(c) 5 Exch. 257.
 (d) 11 A. & E. 373.
 (e) 4 M. & Gr. 226.

be strictly complied with: *Tetley v. Taylor* (a). The words in the 221st section "to all intents and purposes, as fully as if the same were a certificate of conformity under a bankruptcy," have reference to the 199th section, and not to the 205th. The latter section was inserted for the protection of bankrupts in case of arrest for a debt barred by the certificate. It follows the words of the 6 Geo. 4, c. 16, s. 126, which is copied from the 5 Geo. 2, c. 30, s. 7. The adjudication of a Commissioner of bankruptcy on a question of fact is not final. *Fletcher v. Manning* (b) decided, that an order of a Court of Review is not conclusive as to the facts stated in it. The matters not averred in this plea were a condition precedent to the exercise of authority to grant the certificate. The 211th section enables a trader to petition the Court, who is thereupon empowered to grant him protection. The 212th section prescribes the form of petition. By the 213th section, the Court is to appoint a private sitting, and it is imperatively required that notice of such private sitting shall be given to every creditor. This plea admits that no notice was given to the plaintiff, and attempts to excuse the want of it, by alleging that notice was given to the drawer of the bill, and that the defendant was not aware that the plaintiff was the holder of the bill. But it is important that every creditor should have notice; since, by the 215th section, the assent to the proposal by three-fifths in number and value of the creditors above 10*l*. binds the rest. That section requires, that notice of the second sitting be served personally on every creditor who was not present at the first. Then, by the 216th section, at the second sitting the proposal is to be reduced to writing and signed; and such resolution or agreement becomes binding on certain persons only, viz. persons who were creditors at the date of the petition, and had notice of the several sittings of the Court. *Levy v.*

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(a) 21 L. J., Q. B., 346.

(b) 12 M. & W. 571.

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Horne (a) shews that these statutory arrangements are inoperative against persons who were not creditors at the date of the petition. The 221st section must be read in connection with the 216th, that is, the certificate is to operate as a certificate in bankruptcy against all creditors who have had the required notices. If a different construction be put on these enactments, it would be competent for a trader to effect a private arrangement with his creditors to a small amount, and so bar the claims of the larger creditors. The injustice of such a proceeding is pointed out in *Tetley v. Taylor* (b), where the Court of Exchequer Chamber adopt the principle, that the rights of a creditor are not to be barred by mere intendment, but there must be an express enactment to that effect. If the circumstances are such that the trader cannot discover who is the holder of a bill, and is therefore unable to give the proper notice, he must proceed under the other provisions of the statute.

Watson in reply.—If the trader, after certificate granted under the 221st section, were arrested at the suit of a creditor who had received notice, he could only obtain his discharge under the provisions of the 205th section, and because the certificate operates as a certificate in bankruptcy. The argument on the other side would engraft a qualification on the language. [*Maule, J.*—The meaning of that section is, that a certificate granted under it shall operate as a certificate in bankruptcy would operate *upon debts barred by it.*] It must have been intended that the holder of a bill of exchange not due should be barred by the certificate; for, by the 218th section, after the approval and confirmation of the resolution and agreement, all the trader's effects vest in the official assignee.

COLERIDGE, J.—We are all of opinion that the judg-

(a) 5 Exch. 257.

(b) 21 L. J., Q. B., 346.

ment of the Court below ought to be affirmed. Two objections are made to the plea: first, that it does not state that the plaintiff below, who was a creditor at the time of the petition, had notice of the first private sitting; secondly, that it contains no averment "that the resolution or agreement has been carried into effect, and that the creditors have been satisfied." Upon the last point we express no opinion, the ground of our judgment being the want of an allegation of notice. The language of the plea in substance is, that notice of the first private sitting was given to all persons whom the defendant below knew, or had the means of knowing, were creditors, and that he was not then aware that the plaintiff below was the holder of the bill; that, between the time of the first and second sitting, application having been made for payment of the bill, notice was given to the plaintiff below of the second sitting. It is argued that that is not sufficient to satisfy the requisition of the statute as to notice, and a case has been referred to (*a*) which determines that, under an order for protection, constructive notice is insufficient. That authority, however, does not apply to this particular case, and we must look to the language of the plea, and see whether it satisfies the language of the statute. Now the plea assumes that notice of the second sitting was sufficient for that purpose; but the language of the statute is very precise, and the only persons bound by the resolution or agreement are "creditors at the date of the petition, and who had notice of the *several sittings* of the Court." The plea, therefore, does not satisfy the requirements of the statute, and is bad in point of fact. Then let us see how it stands in point of law. The argument has been, that, under the 221st section, the certificate, being once granted, operates in all respects as a certificate in bankruptcy, one effect of which is, that it discharges

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(*a*) *Levy v. Horne*, 5 Exch. 257.

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the petitioner from all debts proveable at the time of the petition. It is further said, that it is conclusive as to all antecedent steps. That raises a point upon which the Court does not pronounce any judgment. We may assume that it is to have its full effect with reference to preliminary proceedings; still it is open to consider to what extent the statute means it to be final, whether, as to all creditors or only as to such creditors as have had the notices mentioned in the 216th section. It seems to us that the last is the conclusion to which we are driven, and which, indeed, is more conformable to the policy of the Act and the sound justice of the case. There is no hardship in such a construction of the statute, for this is not the only remedy which an insolvent trader has; he may become bankrupt, or take other modes of getting relieved from his debts. The object of the Act was, that this proceeding should apply only to the particular case of creditors who had the requisite notice. The other conclusion would lead to the greatest injustice, because this mode of proceeding, not being guarded as others are which ensure notice, the consequence would be that a trader might bring before the Commissioner a certain number only of his creditors, and then make a proposal. But whether or not that proposal was reasonable, would depend not only upon the extent of his assets but of his debts also. The proper course is to look to the statute itself. The party is to present a petition, make a proposal, and give notice to his creditors to come before the Commissioner. Then a second meeting is to be appointed, and, in the interval, notice thereof is to be personally served on the creditors who did not attend the first meeting. When the parties come before the Commissioner, the matter is to be discussed; and if the proposal is confirmed, it becomes a resolution or agreement, and is thenceforth binding against all persons who were creditors at the date of the petition, and who had notice of the several sittings of the Court; and it is bind-

ing against those persons only. If we are to suppose, looking to the 221st section, that the certificate is to operate against all creditors, there may be certain creditors who are bound by the certificate, but who are not bound by the proposal which is the foundation of the proceeding. The two things must be correlative—the extent to which the resolution is to bind, and the extent to which the certificate of conformity is to bar.

For these reasons, we think that the judgment of the Court below must be affirmed.

Judgment affirmed.

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MEMORANDA.

IN Michaelmas Vacation, the Right Honourable *Edward Burtenshaw* Lord *St. Leonards* resigned the Great Seal, which her Majesty was graciously pleased to deliver to the Right Honourable *Robert Monsey* Lord *Cranworth*, one of the Lords Justices of Appeal.

The Right Honourable Sir *George James Turner*, Knight, one of the Vice-Chancellors of *England*, succeeded to the office of a Lord Justice of the Court of Appeal, vacated by Lord *Cranworth*.

Sir *William Page Wood*, Knight, one of her Majesty's Counsel, succeeded to the office vacated by Sir *G. J. Turner*.

Sir *Frederick Thesiger*, Knight, resigned the office of her Majesty's Attorney-General, and was succeeded by Sir *Alexander James Edmund Cockburn*, Knight, one of her Majesty's Counsel.

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Sir *Fitzroy Kelly*, Knight, resigned the office of Solicitor-General, and was succeeded by *Richard Bethell*, Esq., one of her Majesty's Counsel.

In Michaelmas Term, a table of fees was prepared by the Commissioners of her Majesty's Treasury, and was settled, allowed, and sanctioned, by the Lord Chief Justices, the Lord Chief Baron, and by *Maule*, J., *Williams*, J., and *Talfourd*, J.; and this Table of Fees was inserted in the Supplement to the London Gazette on the 23rd of November, 1852 (a).

On the 1st day of the sittings of this Court in Hilary Term 1853, *Pollock*, C. B., announced that the Judges of the Courts of Common Law at Westminster had agreed upon a set of Rules of Practice, which were to be considered as read in Court, and which were to take effect from that time (b).

(a) See the Table in 1 E. & B.
264.

(b) These Rules are to be
found in 1 E. & B., App.

Exchequer Reports.

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Jan. 12.

TRESPASS de bonis asportatis.—Pleas, not guilty, and a justification by authority of a Commission of Sewers, for tax assessed by the commission under the 23 Hen. 8, c. 5. To the plea of justification the plaintiff replied de injuriâ, on which, and on the other plea, issue was joined. The cause was tried before *Jervis*, C. J., at the Lincolnshire Summer Assizes, 1850, when a verdict was found for the plaintiff, subject to the opinion of the Court upon the following case:—

The plaintiff is the owner and occupier of certain lands in the parish of Bilsby in the county of Lincoln. The de-

In the year 1819, a level survey made of lands in Bilsby, in Lincolnshire, liable to be rated to a drain called the Boy Grift, and the Court of Sewers directed a precept to the sheriff, requiring him to summon jurors *de corpore comitatus*, to appear at a certain place and

time, and make a presentment. The sheriff having, under this precept, summoned a jury from the hundred of Calceworth, in the said county, in May, 1819, they made a presentment, that the Boy Grift was ruinous, and that certain works therein were absolutely necessary; and that lands in the occupation of various persons, including the plaintiff, received benefit or avoided danger by the drainage, and ought, therefore, to bear the charges thereof; and they, accordingly, assessed a rate, which the commissioners confirmed. No appeal was made against this presentment or assessment, and in 1823, a special law of sewers was enrolled, containing the presentment, and from that time to the year 1837 all rates were made under such law. No level had been taken or survey made since 1819, nor had any presentment of a jury been made since 1837. In 1840, a new commission of sewers issued; and at the first court holden under it, it was ordered "that all laws, acts, deeds, constitutions, and ordinances of sewers held for the county of Lincoln, and which had not been repealed, altered, or superseded, should be confirmed and stand in full force." In 1846, at a meeting of the commissioners, the dike-reeve required them to authorise him to make a rate according to the above-mentioned survey by level, and without any presentment of a jury, which the commissioners authorised him to do. In 1847 and 1848 similar rates were made, without any presentment of a jury. The plaintiff having refused to pay these rates, the commissioners issued a distress warrant, under which his goods were taken, whereupon he brought an action of trespass:—*Held*, first, that the confirmation of the special law of 1823, by the order of the new commissioners in 1841, rendered the presentment of 1819 operative and applicable to the rates in question, and consequently that they were valid.

Secondly, that, upon a representation of a change of circumstances arising since the presentment, it would be competent for the commissioners to inquire into the facts by a fresh presentment, the 17th section of the 3 & 4 Will. 4, c. 22, being framed for that purpose.

Secondly, that it was no objection to the presentment that the sheriff summoned the whole of the jury from the hundred of Calceworth.

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fendants, before and at the time of making and assessing the rates, and of issuing and executing the warrants hereinafter mentioned, were Commissioners of Sewers for the said county, acting for the district in which the said parish is situate under a commission issued and dated the 25th of November, 1840. The said parish is intersected by a certain public drain called the Boy Grift.

The plaintiff has sustained damage to the amount of 11*l.* 7*s.* 10*d.*, in respect of the trespasses complained of in the declaration. Those trespasses were committed by command of the defendants, and under and by virtue of a warrant under their hands and seals, dated the 23rd of February, 1849. (The case then set out the warrant, which recited that the plaintiff was assessed at the sum of 8*l.* 19*s.* 7*d.*, being three proportion rates of lands in Bilsby in his occupation, towards the works of sewers, and that he had refused to pay &c.) The three rates in the warrant mentioned were rates made for the years 1846, 1847, and 1848 respectively, on the lands of the plaintiff, situate in Bilsby, and within the level drained by the said drain.

On the 3rd of April, 1846, the Commissioners of Sewers for the district in which the said lands lie held an annual meeting. At this meeting the dike-reeve of the parish of Bilsby was present, and in that capacity required that the commissioners should authorise him to make and assess, according to a certain survey and level, a rate for the year 1846, for and in respect of the public drain called the Boy Grift. The commissioners thereupon directed the said dike-reeve to make and assess such rate without any presentment of a jury, except as hereinafter mentioned. The dike-reeve, on the 3rd of April, 1846, in pursuance of the aforesaid authority, made and assessed a rate for and in respect of the Boy Grift drain, upon, among other persons, the plaintiff, in respect of the occupation of his lands within the said level.—The case then proceeded to state the mode of assessment and amount of the rate; and that, in the years 1847 and 1848, similar rates were made by the dike-

reeve, by the authority of the commissioners.—No jury was summoned or empannelled for or at the making of any or either of the aforesaid three rates, but those rates were all made without any presentment of any jury other than as hereinafter mentioned.

In the year 1818, upon the petition of several proprietors and occupiers in Bilsby of lands drained by the Boy Grift, a level was taken and survey made of the lands in Bilsby liable to be rated to the Boy Grift drain; and at a Court of Sewers for the said district, holden on the 22nd of September, 1818, the said court did order, that a precept should be directed to the sheriff of the said county, requiring him to summon a sufficient number of good and lawful men of the county of Lincoln, in nowise concerned in the drainage by Bilsby Boy Grift Gowt and Outfall, or either of them, or any of the lands draining through the same, by whom the truth might be best known, to be and appear at the then next Court of Sewers to be holden at Mablethorpe in the said county, on Thursday the 15th of October then next, at 10 o'clock in the forenoon, then and there to be empannelled, sworn, and charged to inquire and present such things as should be then and there given them in charge.

At a Court of Sewers for the said district, holden at Mablethorpe on the 15th of October, 1818, a jury appeared, and was empannelled by the said court. The said jury was summoned from the hundred of Calceworth, in the said county. The last-mentioned court was adjourned to the 15th of May, 1819. At a Court of Sewers, holden by adjournment at Alford, on Saturday, the 15th of May, 1819, the said last-mentioned jury again appeared.

On the 15th of May, 1819, a presentment was made by a jury of the hundred of Calceworth, in the county of Lincoln, whereby it was presented in substance that the Boy Grift Gowt and Outfall was in a very ruinous and dangerous state, and insufficient for the drainage of the

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lands entitled to be drained thereby; that certain works therein mentioned were absolutely necessary; and the jury did thereby find that the several quantities of land in the occupations of persons named in the schedule received benefit or avoided danger by such drainage, and ought therefore to bear the charges thereof; and did thereby find that the plaintiff was the proprietor and occupier in Bilsby of 21A. 3R. 16P. of land. It further found in Bilsby 1374A. 3A. 3P. liable to the rate, and assessed a rate of 4d. per acre, payable by instalments. Afterwards, at a court holden the 3rd of June, 1819, a rate, calculated in the proportions in the schedules named, was made.

No appeal was made against this rate or assessment; and at a special Court of Sewers holden on the 27th of June, 1823, a special law of sewers was signed and sealed, and ordered to be registered on the rolls of the said court, containing the said presentment and proceedings touching the said works; which said law was accordingly registered; and from that time to the year 1837, each of the rates made was founded on the presentment of a jury in the proportions settled by the survey and level so made in the year 1819, and comprised in the said law of sewers.

No level has been taken or survey made since the year 1819. No presentment of a jury has been made, nor any jury empannelled since the year 1837; but at a court held at Allford, on the 16th of April, 1841, being the first court holden after the issuing of the last commission, the following order was made:—"Ordered, that all laws, acts, deeds, constitutions, and ordinances of sewers heretofore made, enacted, ordained, and decreed by Courts of Sewers held in and for the county of Lincoln, and which have not been repealed, altered, or superseded, be confirmed and stand in full force."—All rates made subsequent to 1837 were made in the same manner as those for the years 1846, 1847, and 1848.

The question for the opinion of the Court was, whether,

under the above circumstances, the defendants were legally justified in taking the goods of the plaintiff, and whether they are liable to an action of trespass for so doing. If the defendants were not legally justified, and liable to an action, the verdict is to stand; otherwise to be entered for the defendants.

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Willes (Cockle with him) argued for the plaintiff (Nov. 10). The rates in question are invalid, there having been no presentment of a jury since the year 1819: *Rex v. Commissioners of Sewers for the County of Somerset* (a), *Wingate v. Waite* (b). Callis, in his Reading on the Statute of Sewers (c), after stating "what things officers of sewers may do by survey only," proceeds to describe the "things to be done by a jury:" first, they must find what persons have erected any let or impediments, as a flood-gate, mill-dam, &c. Secondly, through whose default any wall, bank, river, sewer, or other defence is defective; and thirdly, what persons are bound to do the repairs. It was formerly doubted whether a presentment was not necessary upon each occasion to repair; but the 3 & 4 Will. 4, c. 22, s. 13, enacts, that whenever there shall have been a presentment under any commission, it shall not be necessary to have another presentment, upon any subsequent reparation of the same defences, *during the continuance of such commission*. That enactment assumes that the commissioners could not act without a presentment; and the 17th section provides, that nothing therein contained shall prevent the commissioners from causing inquiry and presentment by a jury as before. [*Platt*, B., referred to Com. Dig. "Sewers," (C 5).] No person is liable to contribute to a rate of this kind, unless it is found by a jury that he will receive benefit or avoid damage by the proposed works; but it is not shewn that these assess-

(a) 9 East, 109.

(b) 6 M. & W. 739.

(c) Page 108.

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ments were in respect of any benefit received or damage avoided by the drainage which, in the year 1819, a jury found was necessary. The presentment was with reference to a state of circumstances then existing, and which in the year 1846 may have been materially altered. The case of *St. Katherine Dock Company v. Higgs* (a) affords an instance of the change of levels. Under the presentment in 1819, the then commissioners could only compel those persons to contribute whose names were mentioned in the schedule, and who might have traversed the presentment. But, assuming that the plaintiff could now do so, a traverse, that the land in the occupation of the persons named in the schedule did not receive benefit or avoid danger by the drainage, would not raise the question, whether the plaintiff was liable to be assessed. Further, the presentment itself is invalid. The precept requires the sheriff to summon a jury of the county, but the jury was summoned from the hundred of Calceworth: *Birkett v. Crozier* (b), *Custodes Libertat. &c. v. The Inhabitants of Outwell* (c).

Mellor for the defendants.—The presentment in 1819 was sufficient to warrant these rates. It is clear that, since the 3 & 4 Will. 4, c. 22, there need be no new presentment in respect of the same works during the existence of the same commission, yet, non constat that persons assessed in 1845 would be the same as those mentioned as receiving benefit in a presentment of 1835. It is immaterial whether the plaintiff can traverse the presentment, because, if he derives no benefit nor avoids danger by the drainage, he may dispute his liability to be rated in an action of trespass or replevin: *Stafford v. Hamston* (d). The jury only inquire as to the then state of the drainage, and

(a) 10 Q. B. 641.

(b) Moo. & M. 119.

(c) Sty. 184, 191.

(d) 2 Brod. & B. 691.

what lands would be benefited or avoid damage by new works: Callis on Sewers, pp. 108, 109, 110; and if there is a subsequent change of circumstances, which alters the liability, the parties may appeal against the rate. The 3 & 4 Will. 4, c. 22, s. 7, enacts, "That all laws, acts, decrees, constitutions, and ordinances, made or to be made by any Court of Sewers, and duly registered in the rolls or books of such court by the clerk to the commission, shall continue in full force and effect, notwithstanding the expiration, repeal, or other determination of the commission under which such laws, acts, decrees, constitutions, and ordinances shall have been respectively made," &c. The case finds that, on the 27th of June, 1823, a special law of sewers was enrolled, containing the presentment in question; so that it thereby became incorporated with and formed part of the laws. Those laws were confirmed by an order of the court after the new commission issued, and consequently there is a valid decree of the present commissioners that this particular drainage is necessary, and that lands in the occupation of certain persons receive benefit or avoid danger by such drainage.

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The Court then called on

Cockle to reply.—The 7th section of the 3 & 4 Will. 4, c. 22, does not authorise the commissioners to make laws at variance with their administrative functions. If the construction suggested be put upon that section, the 13th and 17th will be rendered inoperative. It is difficult to see to what those sections can apply, unless the legislature contemplated a fresh presentment under a new commission.

Cur. adv. vult.

POLLOCK, C. B.—In this case we are of opinion that the judgment of the Court must be for the defendants.

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The question was, as to the validity of certain rates made in 1846, 1847, and 1848, on the plaintiff's lands. The dike-reeve, in 1846, having applied to the commissioners to authorise him to make a rate according to a survey by level in respect of the Boy Grift (a drain intersecting the parish of Bilsby), the commissioners authorised him to do so without any special presentment of a jury previously being made on that occasion; and the same thing happened in 1847 and 1848. It was for these rates that the distress warrant of the commissioners was issued and the plaintiff's goods seized.

There is no doubt, that, according to the law which governs in these cases, a previous presentment is necessary to justify such a rate. It is unnecessary to cite authorities to shew this. But the question here is, whether there has not been a sufficient previous presentment by a jury.

The case states that, in the year 1818, on the petition of the occupiers in Bilsby of lands drained by the Boy Grift, a level was taken and survey made of the lands in Bilsby liable to be rated to the Boy Grift; and on September 22nd, 1818, the Court of Sewers directed a precept to the sheriff, requiring him to summon jurors *de corpore comitatûs* of Lincoln, to appear and inquire; and that, on the day of appearance, the sheriff having under this precept summoned a jury out of the hundred of Coleworth, the jurors appeared, and there was an adjournment to the 15th of May, 1819, when a presentment was duly made by that jury, that the Boy Grift was ruinous; and they also found certain lands in the occupation of various persons (included in a schedule) received benefit or avoided danger by the drainage through the Boy Grift, and ought, therefore, to bear the charges of repairing it. The plaintiff's lands were included in this schedule and presentment. No appeal was made against this presentment or the assessment made under it; and on the 27th of June, 1823, a special law of sewers was made and registered in

the rolls of that court containing the said presentment, touching the said works; under which special law of sewers all rates up to the year 1837 have been, and since, from time to time made without objection. In the year 1840, however, a new Commission of Sewers was issued; and at the first court under it, it was ordered that all laws, acts, deeds, constitutions, and ordinances of sewers theretofore made, enacted, ordained, and decreed by Courts of Sewers held for the county of Lincoln, and which had not been repealed, altered, or superseded, should be confirmed, and stand in full force.

At the time of the argument, it was conceded that it was not necessary to have any fresh presentments during the continuance of the commission under which the presentment was first made, that being clearly provided for by the 3 & 4 Will. 4, c. 22, s. 13; but it was said that this could not apply to another and subsequent commission, the Act being limited expressly by the words "during the continuance of such commission." There might have been some difficulty if the case turned on the proper construction to be put on this clause. But here the law of sewers, made on the 27th of June, 1823, and confirmed by the act of the commissioners in the year 1841, makes it unnecessary to examine into that question; for, after that act, against which no appeal has ever been made, we think that the presentment of the 15th of May, 1819, remains still operative; and that the rates made upon and by virtue of it in 1846, 1847, 1848, were therefore valid. Probably, upon a representation of a change in circumstances arising since such presentment, it would be competent for the commissioners to inquire into the facts by a new jury and a fresh presentment, just as if no previous presentment had been made; and for this purpose it is probable that the 17th section of the 3 & 4 Will. 4, c. 22, was framed.

But here, in 1837, there was an existing ordinance or

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decree of sewers, valid, and continuing during their continuance, and this is confirmed by the new commission; and we think this virtually makes the ordinance or decree under the old, an ordinance or decree under the new commission also. Now it is clear that, according to the law of sewers (Callis, 281), the commissioners have power to constitute and ordain laws, ordinances, and decrees; as Callis says, not only *jus dicere*, but *jus facere*. These laws must, however, be for the safeguard, conservation, redress, correction, and reformation of the matters committed to their charge, and necessary and behoveful, and chiefly (as Callis afterwards says) *pro bono publico*, and not *pro privato alicujus*.

Now, we think this decree or ordinance, whichever it may be, fulfils all these requisites. It is made *pro bono publico*. It is necessary and behoveful that all decrees in force should remain in force; and that parties should not, by the issue of a new commission, be altered in their previous rights and liabilities; and it is clearly applicable to the conservation and reformation of the Boy Grift, one of the matters committed to the new commissioners to preserve and repair. We think, therefore, that this resolution of the new commissioners was legal and valid; and that its effect really is to make the presentment of May, 1819, a continuing and valid presentment applicable to the rates in question; and that these rates were therefore valid.

It was suggested, but not much argued, that the first presentment was bad, as the jury was summoned by the sheriff from the hundred of Calceworth only. This is a mere mistake of fact. The precept to the sheriff was to summon *de corpore comitatûs*, and was therefore right even according to *Birkett v. Crozier* (a). The sheriff in his discretion, as he well may, in obedience to this pre-

(a) *Mov. & M.* 119.

cept, summoned jurors who resided in a particular hundred; but, in law, they are jurors de corpore comitatûs still. Under these circumstances, he has had an unlimited discretion given him; but, like a wise man, has exercised it in the most convenient way. We think there must be judgment for the defendants.

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Judgment for the defendants.

THE WATERFORD, WEXFORD, WICKLOW, AND DUBLIN RAILWAY COMPANY v. PIDCOCK. Jan. 15.

DEBT for railway calls. The declaration, which was in the statutory form, alleged that the defendant was the holder of fifty shares in the Waterford, Wexford, Wicklow, and Dublin Railway Company, and was indebted to the plaintiffs in 175*l.* for three calls upon the shares. Plea, that the defendant was not the holder of the said shares, modo et formâ; upon which issue was joined.

At the trial before *Martin*, B., at the Middlesex Sittings after last Michaelmas Term, the plaintiffs' evidence consisted of proof of notice of the calls, and the production of the sealed register of shareholders, in which the defendant's name appeared as the holder of fifty shares in

The defendant, by letter, requested the provisional committee to allot to him one hundred shares in a proposed Railway Company. In answer he received the following letter:—"Sir, The provisional committee having allotted to you fifty shares of 20*l.* each in this undertaking, I am instructed to re-

quest that you will pay a deposit upon them of 1*l.* 10*s.* per share, on or before the 30th instant, to one of the following bankers," &c. "I beg also to inform you that scrip certificates for the above number of shares will be delivered to you in exchange for this letter and the banker's receipt for the deposit, after the execution of the parliamentary contract and subscribers' agreement, which will lie for your signature at this office on and after Monday the 30th instant." At the foot of the letter was the following memorandum:—"The shares allotted to you will be considered forfeited, if the deposit be not paid within the period specified above, and the parliamentary contract and subscribers' agreement must be signed on or before the 20th of August, 1845." The defendant paid the deposit, but did not sign the parliamentary contract or subscribers' agreement. The Company was afterwards incorporated, and the defendant's name was placed on the sealed register of shareholders. In an action for calls:—*Held*, that the defendant was not a shareholder, and that the above circumstances were an answer to the *prima facie* case arising from the production of the register containing the defendant's name.

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the Company. On behalf of the defendant, it was proved that, on the 29th of April, 1845, he sent the following letter of application:—

“To the Provisional Committee of the Waterford, Wexford, Wicklow, and Dublin Railway Company.

“Gentlemen,—I request that you will allot to me 100 shares, of twenty pounds each, in the proposed Waterford, Wexford, Wicklow, and Dublin Railway Company, on the terms and conditions of the prospectus; and I undertake to pay the deposit and sign the necessary deeds when required.

“Dated, the 29th day of April, 1845.

“*Name* . . . JOHN HENZIEY PIDCOCK.

“*Place of abode, &c.*”

In answer to this application, the defendant received the following letter:—

“Waterford, Wexford, Wicklow, and Dublin Railway.

“Offices of the Company, 449, West Strand,
 London, June 11, 1845.

“Sir,—The Provisional Committee having allotted to you fifty shares of 20*l.* each in this undertaking, I am instructed to request that you will pay a deposit upon them of 1*l.* 10*s.* per share, on or before the 30th instant, to one of the following bankers, who will sign the receipt at the foot hereof.

[Here followed a list of bankers.]

“I also beg to inform you, that scrip certificates for the above number of shares will be delivered to you, in exchange for this letter and the banker’s receipt for the deposit, after the execution of the parliamentary contract and subscribers’ agreement, which will lie for your signature at this office on and after Monday, the 30th instant, or at the offices of Mr. George Little, solicitor, Wexford, and 19, Westmorland-street, Dublin.

"Be pleased to observe that this letter, with the banker's receipt attached, should be produced when you attend to execute the deed.

"I am, Sir, your obedient servant, &c.

"The shares allotted to you will be considered forfeited if the deposit be not paid within the period specified above; and the parliamentary contract and subscribers' agreement must be signed on or before the 20th August, 1845.

"No. Banker's Receipt. 1845.

"Received on account of the Provisional Committee of the Waterford, Wexford, Wicklow, and Dublin Railway, — Pounds, —, to account for on demand.

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On the 17th of June, the defendant paid the deposit on fifty shares to one of the bankers mentioned in the letter of allotment; but he never signed the parliamentary contract or subscribers' agreement, nor was he called upon to do so, nor did he any other act with regard to the Company. The requisite capital having been subscribed, the Company was incorporated by the 9 & 10 Vict. c. ccviii. It was submitted on the part of the defendant, that, under the above circumstances, he was not a shareholder in the Company; and the learned Judge, being of that opinion, nonsuited the plaintiffs, reserving leave for them to move to enter a verdict.

Hugh Hill now moved accordingly.—The question is, whether the name of the defendant was rightly placed on the sealed register of shareholders. That depends upon whether he was "a subscriber" within the meaning of the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16. By the interpretation clause (sect. 3), "The word 'shareholder' shall mean shareholder, proprietor, or mem-

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ber of the Company." By section 8, "Every person who shall have subscribed the prescribed sum or upwards to the capital of the Company, or shall otherwise have become entitled to a share in the Company, and whose name shall have been entered on the register of shareholders hereinafter mentioned, shall be deemed a shareholder of the Company." Here the defendant subscribed, and his name was entered on the register of shareholders. It is true that the number of shares allotted to him was less than he applied for, but his payment of the deposit was an assent to receive the less number: *Fox v. Clifton* (a). The execution by the defendant of the parliamentary contract and subscribers' agreement was not a condition precedent to his becoming a shareholder. That term was a stipulation for the benefit of the Company, which they might dispense with; and they have done so, by adopting the payment and placing the defendant's name on the register of shareholders. This case is distinguishable from *Hutton v. Thompson* (b), for there the Company was never in fact established. [Alderson, B.—By the 21st section, "The several persons who have subscribed any money towards the undertaking, or their legal representatives respectively, shall pay the sums respectively so subscribed, or such portions thereof as shall from time to time be called for by the Company, at such times and places as shall be appointed by the Company," &c. Therefore, it is manifest that the persons entitled to be put upon the register of shareholders are persons who have, according to that section, subscribed for the whole sum, that is, undertaken to pay the whole sum by such calls as shall be afterwards made. A person would have no right to be placed on the register by merely paying a deposit.—Parke, B., referred to *Bourne v. Freeth* (c).]—He also cited *The West Cornwall Railway Company v. Mowatt* (d), *Pitchford v. Davis* (e).

(a) 6 Bing. 776.

(b) 3 H. L. 161.

(c) 9 B. & C. 632.

(d) Q. B., June 4, 1850.

(e) 5 M. & W. 2.

PARKE, B.—There ought to be no rule. The 8 & 9 Vict. c. 16, s. 28, renders the sealed register of shareholders *prima facie* evidence of a defendant being a shareholder, and of the number and amount of his shares. That is certainly a hard case, because the Company may put the name of any person on the register, and throw upon him the burthen of proving that he is not a shareholder. No doubt the legislature presumed that the power would be fairly and properly exercised. Then, in this case, it is incumbent on the defendant to shew that he is not a shareholder. Now he originally proposed to the provisional committee to subscribe for 100 shares. That offer was not accepted; but there was a proposal from the Company that he should be a subscriber for fifty shares. The term “subscriber” is explained by the 8th section, which enacts, that “every person who shall have subscribed the prescribed sum or upwards to the capital of the Company, or shall otherwise have become entitled to a share in the Company,” that is, subscribed so as to be entitled to a share in the Company, “and whose name shall have been entered on the register of shareholders,” shall be deemed a shareholder. The question therefore is, whether the defendant has subscribed so as to become entitled to a share in the Company. The proposal made by the Company is contained in the letter of allotment, by which the defendant is informed that the provisional committee have allotted to him fifty shares of 20*l.* each; and further, he is requested to pay the deposit before a certain day to one of the bankers mentioned, who will sign a receipt for it in the form given at the foot of the letter; and then it goes on, “I also beg to inform you, that scrip certificates for the above number of shares will be delivered to you in exchange for this letter and the banker’s receipt for the deposit, after the execution of the parliamentary contract and subscribers’ agreement.” It is clear, therefore, that the defendant was not to have any benefit until he executed the parliamentary

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contract and subscribers' agreement, and brought that letter and the banker's receipt in exchange for scrip certificates. Therefore, according to the terms of the first part of the letter, the execution of the parliamentary contract and subscribers' agreement is a condition precedent to his becoming a shareholder. The precise time for payment of the deposit is there mentioned; but the period for executing the parliamentary contract and subscribers' agreement is not mentioned,—it may be on or after the 30th of June. At the bottom of the letter is this memorandum—"The shares allotted to you will be considered forfeited, if the deposit be not paid within the period specified above; and the parliamentary contract and subscribers' agreement must be signed on or before the 20th of August, 1845." No doubt, to constitute a performance of that agreement, the parliamentary contract and subscribers' agreement must be also signed on or before the 20th of August, 1845; and therefore the defendant is not a subscriber at all. That he is not, is his own fault; and probably he could not recover back the deposit, since he has the option to continue or abandon the matter. At all events he certainly is not a subscriber; and having disproved his *prima facie* liability, my Brother *Martin* was quite right in non-suiting the plaintiffs.

ALDERSON, B.—I am of the same opinion. The whole case against the defendant is the production of the sealed register. That shews *prima facie* that he is a shareholder. Then, in answer, he says, "I will shew that you ought not to have put my name on the register; you had no authority for so doing." Then what is the authority? The 9th section requires the Company to keep a book, to be called the "Register of Shareholders;" and by the 8th section, they can only insert on that register the names of persons who have become entitled to a share in the Company. Then, let us see who is entitled to a share in the Com-

pany—"every person who shall have subscribed the prescribed sum or upwards to the capital of the Company." Therefore, the only authority the Company has, is to put the names of those persons on the register. Then is the defendant a person who has "subscribed the prescribed sum," and what is the meaning of that term? Looking to the 21st section, I think it means a person who, thus subscribing, makes himself responsible, not only for the deposit, but also for the whole sum capable of being levied by calls. The defendant is not a person in that situation. By his offer to the Company he says, "I wish you to assign me one hundred shares; I will pay the deposit—I will subscribe." They reply, "You may have fifty shares, pay the deposit, subscribe, and you shall have scrip certificates;" that is, certificates of having subscribed. But though he has paid the deposit, he has not subscribed the prescribed sum, and therefore is not responsible within the 21st section; and consequently the Company had no authority to put his name on the register. In point of fact, the 20th of August is the limit of time within which the Company bind themselves to accept the subscription. The *prima facie* case of liability has been answered, and the plaintiffs were properly nonsuited.

MARTIN, B.—I am entirely of the same opinion. I should be sorry if the Act of Parliament were found to authorise these Companies to put a person's name on the list of shareholders, who did not, by his contract, agree that it should be placed there. Now, this contract amounts to nothing more than an agreement to pay the deposit and become a shareholder; and if there is any right of action against the defendant (which I do not think there is, for I concur with my Brother *Parke* that it is open to a person to elect to forfeit the deposit), it is for the breach of that agreement. The persons to be put upon the register are those entitled to shares, that is, persons who have a

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right to require the Company to give them shares. The defendant has no such right, because he has not fulfilled the terms upon which the shares were offered. The legislature, no doubt, meant that, in order to become a subscriber, a person should put his name to some document which would speak for itself, and thus authorise the putting his name on the register.

POLLOCK, C. B.—I agree with the rest of the Court. The difficulty arises from the ambiguous meaning of the word “subscribe,” which means, in some phrases, the consent to pay a sum of money; in others, the assent to some particular thing, such as an article of faith. This statute uses the word “subscribe” in its literal sense, viz putting down a person’s name for some interest in the capital of the Company, and that the defendant never did. Even assuming that if a person paid the whole sum he would be entitled to a share, whether he had signed the deed or not, the mere payment of this small sum, which is collected for a special purpose only, is by no means to be considered as a subscription.

Rule refused.

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CHRISTIE and Another, Assignees of TANDY, a Bankrupt,
v. SIR THOMAS WINNINGTON, Bart.

Jan. 20.

TROVER for goods and chattels.—Pleas, not guilty, and not possessed.

At the trial, before *Williams, J.*, at the last Worcester Assizes, it appeared that the action was brought by the plaintiffs, as assignees of one Tandy, a bankrupt, against the sheriff of Worcestershire, for taking in execution the goods of the bankrupt, under the following circumstances:—In August, 1851, the bankrupt, who was an ironmonger at Stourbridge, being indebted to one Langman, executed a cognovit for payment of the debt by instalments. Default having been made in payment of one of the instalments, Langman entered up judgment, and issued a writ of fieri facias, under which the furniture and stock in trade of the bankrupt were seized by the sheriff on the 19th of December, 1851.—On Saturday, the 20th of December, at about three o'clock in the afternoon, the bankrupt executed an assignment of all his property for the benefit of his creditors, which was the act of bankruptcy relied on. Between five and six o'clock on the same day a notice of this act of bankruptcy was left at the residence of Langman, at Wolverhampton; but he, being from home, did not receive it until Sunday, the 21st. Between eight and nine o'clock in the evening of Saturday, the 20th of December, the sheriff executed to Langman a bill of sale in the ordinary form, containing a clause of indemnity by Langman to the sheriff. Langman executed the bill of sale about three o'clock in the afternoon of Monday, the 22nd of December, and immediately afterwards the goods in question were delivered over to him.

An execution against the goods of a bankrupt is valid, within the 12 & 13 Vict. c. 106, s. 133, when the sheriff executes the bill of sale, notwithstanding it contains a clause of indemnity to the sheriff by the execution creditor, and is not executed by the latter until after he has had notice of an act of bankruptcy.

It was submitted, on the part of the defendants, that

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the plaintiffs could not recover, inasmuch as the execution was rendered valid by the 12 & 13 Vict. c. 106, s. 133(a). The plaintiffs' counsel contended that the sale was not complete until the execution of the bill of sale by Langman, which was after he received notice of the act of bankruptcy. The learned Judge, on the authority of *Mur-*

(a) The section is as follows:—

“And, with respect to transactions with the bankrupt, and executions against his property up to the time of the bankruptcy, or within a limited time previously thereto, it is enacted:—

“That all payments really and bonâ fide made by any bankrupt, or by any person on his behalf, before date of the fiat or the filing of a petition for adjudication of bankruptcy, to any creditor of such bankrupt; and all payments really and bonâ fide made to any bankrupt before the date of the fiat or the filing of such petition; and all conveyances by any bankrupt bonâ fide made and executed before the date of the fiat or the filing of such petition; and all contracts, dealings, and transactions, by and with any bankrupt, really and bonâ fide made and entered into before the date of the fiat or the filing of such petition; and all executions and attachments against the lands and tenements of any bankrupt bonâ fide executed by seizure; and all executions and attachments against the goods and chattels of any bankrupt bonâ fide executed and levied by seizure and sale before the date of the fiat or the filing of such petition, shall

be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed: Provided the person so dealing with, or paying to, or being paid by such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, had not at the time of such payment, conveyance, contract, dealing, or transaction, or at the time of so executing or levying such execution or attachment, or at the time of making any sale thereunder, notice of any prior act of bankruptcy by him committed: Provided also, that nothing herein contained shall be deemed or taken to give validity to any payment, or to any delivery or transfer of any goods or chattels made by any bankrupt, being a fraudulent preference of any creditor of such bankrupt, or to any conveyance or equitable mortgage made or given by any bankrupt by way of fraudulent preference of any creditor of such bankrupt; or to any execution founded on a judgment on a warrant of attorney or cognovit actionem or Judge's order obtained by consent, given by any bankrupt by way of fraudulent preference.”

ray v. The Earl of Stair(a), left it to the jury to say whether it was intended that the bill of sale should take effect upon its execution by the sheriff, and also whether Langman had notice of the act of bankruptcy before the execution of the bill of sale by the sheriff. The jury having found the first question in the affirmative, and the second in the negative, a verdict was entered for the defendant, leave being reserved for the plaintiff to move to enter a verdict for him, if the Court should be of opinion that the property did not pass upon the execution of the bill of sale by the sheriff.

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Alexander, in Michaelmas Term, obtained a rule nisi accordingly, against which

Keating and *Whitmore* now shewed cause.—The title of the execution creditor was complete before he received notice of the act of bankruptcy. There was an absolute execution of the bill of sale by the sheriff, and not a mere delivery as an escrow. Where one of several partners executed an assignment of the partnership property before, but the others did not execute it until after, a fiat in bankruptcy had issued, it was held, in the absence of any thing to shew that the deed was delivered as an escrow, that it amounted to an act of bankruptcy by the one who so executed it, and that his share of the partnership property passed to the assignees under the fiat: *Bowker v. Burdekin* (b).

The Court then called on

Alexander and *Gray* to support the rule.—The sale was not complete within the meaning of the 12 & 13 Vict. c. 106, s. 133(c), until both parties had executed the deed. The clause of indemnity shews that the transaction was merely

(a) 2 B. & C. 82. (b) 11 M. & W. 128. (c) Ante, p. 288.

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inchoate. [*Parke, B.*—The property would vest upon the execution by the sheriff, unless the indemnity was a condition precedent.] The deed was delivered by the sheriff to the officer to be delivered over with the goods to Langman upon his execution of it. If Langman had refused to execute the deed, could it be said that the property would pass, while at the same time the sheriff was deprived of his indemnity. A *sale* ought to confer all legal and equitable rights, free from the power of repudiation by either party. In equity, Langman would have had no right to the possession of the goods until he had given the indemnity; and if he had sued the sheriff for detaining them, a Court of equity would have staid the proceedings until he executed the deed.

POLLOCK, C. B.—The rule ought to be discharged. I lay no stress upon the express use of the words “I deliver this deed as an escrow;” for if in point of fact it is delivered not to take effect as a deed until some condition is performed, it will operate as an escrow, notwithstanding the delivery is in form absolute. That which pressed on my mind was, that the sheriff intended to have an indemnity, and probably never meant that the deed should be acted on without it. He has, however, delivered the deed absolutely, and possibly he may have thought it unnecessary to deliver it as an escrow, because the only person who could take any benefit under it could not do so without executing it.

ALDERSON, B.—I am of the same opinion. The delivery was absolute, the sheriff intending to rely upon Langman’s execution of it.

PLATT, B., concurred.

Rule discharged (a).

(a) *Parke, B.*, was absent.

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GREATREX v. HAYWARD.

Jan. 26.

CASE.—The declaration stated that, whereas the plaintiff, at the several times when, &c. was seised in fee of the reversion of certain, to wit, of six closes situate in the parish of Sutton Coldfield, in the county of Warwick, in two of which closes was a certain pit, a part thereof being in each of the said two closes, and that long before and at the time of the committing of the grievances hereinafter mentioned, the water of a certain stream or water-course did run and flow, and of right ought to have run and flowed unto and into the said pit, for supplying the same with water for the washing and watering of cattle, and for other useful and beneficial purposes in that behalf; yet the defendant, intending &c. whilst the plaintiff was so interested in the said pit, to wit, on &c., wrongfully and injuriously diverted and turned the water of the said stream or water-course out of the same and away from the said pit, and kept and continued the water of the said stream or water-course so diverted for a long time, to wit, &c., and thereby hindered and prevented the water of the said stream or water-course from flowing along its usual course unto and into the said pit, and from supplying the same with water for the purposes aforesaid, as the same ought to have done, and otherwise would have done, whereby the plaintiff had been greatly injured in his reversionary estate in the said closes and pits, &c.

Pleas, first, that the water of the said stream ought not of right to have run and flowed, or to run and flow, unto and into the said pit; and secondly, not guilty.—Upon which pleas issues were joined.

At the trial, before *Alderson*, B., at the last assizes for the county of Warwick, a verdict was entered for the plaintiff, with 40*s.* damages, subject to a special verdict, which

The flow of water from a drain made for the purposes of agricultural improvements, for twenty years, does not give a right to the neighbour, so as to preclude the proprietor from altering the level of his drain for the improvement of his land.

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embodied the following facts:—The plaintiff's two closes adjoined each other, and were also adjoining to a close belonging to the Corporation of Sutton Coldfield, and in the occupation of the defendant. From the year 1796 up to the time of action brought, there was a pit partly situate in each of the plaintiff's closes, and during all that time the pit had been principally supplied with water coming from the close in the defendant's occupation, and the water so supplied to the pit ran through and by means of an artificial underground sough or drain, which had before 1796 been by the owners or occupiers of the defendant's close laid in and made to run out of the same into a ditch of the plaintiff's which bounded the defendant's close, and from and out of this ditch into the pit. This sough was made for the purpose of carrying the water off the defendant's close and for its better cultivation, and the water from the sough usually flowed in a regular stream, but was subject to occasional interruptions from the sough being temporarily choked up by the roots of trees or otherwise. The pit was an open pit, and the water in it had ever been, during the above-mentioned time, used and enjoyed by the occupiers of the plaintiff's two closes for watering cattle and otherwise, openly and without interruption. The sough aided the general surface drainage of the defendant's close, which was of a boggy nature, and the water which passed through the sough did not come from any defined or ascertainable source. In September, 1851 (being within a year of action brought), the defendant made alterations in the drainage of his close, by constructing a new sough, and by deepening the course of the old sough, for the purpose of more effectually draining and cultivating his close; and by means of the alterations, the water which had been accustomed to flow into the plaintiff's pit flowed into the ditch at a lower level, whereby the plaintiff's pit lost the water which had been accustomed to flow into it through the said sough.

Mellor (*Field* with him) for the plaintiff.—It is submitted, that by the uninterrupted enjoyment of the flow and use of this water for the time mentioned, the plaintiff has gained a right to its continuance, either at common law by the presumption of a grant, or by virtue of the Prescription Act, 2 & 3 Will. 4, c. 71. [*Martin*, B.—The user is not stated to have been as of right. *Parke*, B.—The cases of *Arkwright v. Gell* (a) and of *Wood v. Waud* (b) are opposed to the plaintiff's claim.] The present case has been brought before the Court for the purpose of obtaining a decision upon the point which was put by way of illustration only in those cases. [*Alderson*, B.—In one sense, perhaps, it may be said that the plaintiff has enjoyed the use of this water as of right, because the defendant has not in any way impeded such use; but it is not such a user as of right as will serve his present purpose, for there has been no adverse user.] The servient owner has not done any act to prevent the flow of the water upon his land, but there is no submission (*patientia*) on his part. He finds that he can beneficially use the water, and he does so. The flow is beneficial to both tenements; to the one by the discharge, and to the other by the use to which he puts the water on receiving it; under such circumstances, a reciprocal easement may naturally be presumed. [*Parke*, B.—The right of the party to an artificial water-course, as against the party creating it, must depend upon the character of the water-course, and the circumstances under which it was created. This water-course is clearly of a temporary nature only, and is dependent upon the mode which the defendant may adopt in draining his land. This is the precise case which was put by this Court in *Wood v. Waud*, where it is said by the Court in the judgment, which underwent much consideration, that "The flow of water for twenty

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(a) 5 M. & W. 203.

(b) 3 Exch. 748.

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years from the eaves of a house could not give a right to the neighbour to insist that the house should not be pulled down or altered, so as to diminish the quantity of water flowing from the roof. The flow of water from a drain, for the purposes of agricultural improvements, for twenty years, could not give a right to the neighbour so as to preclude the proprietor from altering the level of his drains for the greater improvement of his land. The state of circumstances in such cases shews, that one party never intended to give, nor the other to enjoy, the use of the stream *as a matter of right*." *Alderson, B.*—Take the case of a farmer, who, under the old system of farming, has allowed the liquid manure from his fold-yard to run into a pit in his neighbour's field, but, upon finding that the manure can be beneficially applied to his own land, has stopped the flow of it into his neighbour's pit, and converted it to his own use; could it be contended that the fact of his neighbour having used this manure for upwards of twenty years, would give the latter the right of requiring its continuance?]*—Magor v. Chadwick* (a), *Tickle v. Brown* (b), and *Bright v. Walker* (c), were referred to in the course of the argument.

Hayes (*Macaulay* with him), for the defendant, was not called upon.

POLLOCK, C. B.—There must be judgment for the defendant. This question has in truth been already decided by the cases referred to by my Brother *Parke*, and we do not see any reason for altering the opinion which we then formed.

PARKE, B.—We have given much consideration to this

(a) 11 A. & E. 571. (b) 4 A. & E. 369. (c) 1 C. M. & R. 211.

question, and I should be greatly surprised if our judgment were to be overruled.

ALDERSON, B., and MARTIN, B., concurred.

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Judgment for the defendant.

CLAY v. CROWE.

Feb. 12.

THE declaration stated, that the plaintiff sues the defendant for money payable by the defendant to the plaintiff for goods bargained, sold, and delivered by the plaintiff to the defendant; and for that the plaintiff, on the 1st day of April, in the year 1852, by his bill of exchange now over-due, directed to the defendant, required the defendant to pay to the plaintiff's order 28*l.* 3*s.*, two months after date; and the defendant accepted the said bill, but did not pay the same.

The defendant pleaded, secondly,—“As to 42*l.* 5*s.* 2*d.*, parcel, &c. the defendant says that, before action, the plaintiff, by his bill of exchange directed to the defendant, required the defendant to pay to the plaintiff's order 42*l.* 5*s.* 2*d.* five months after date; and the defendant accepted and delivered to the plaintiff, who took and received, such bill for and on account of the said sum of 42*l.* 5*s.* 2*d.*, parcel, &c.: and the plaintiff afterwards lost such bill out of his possession, and from thence hitherto the same has remained so lost, and the plaintiff has been unable to produce it, and ceased to have any power or

To an action for goods bargained, sold, and delivered, the defendant pleaded, as to 42*l.*, parcel, that before action he accepted a bill of exchange for that amount, drawn on him by the plaintiff, payable to the plaintiff's order five months after date; that the plaintiff took and received such bill for and on account of the said sum of 42*l.*; and the plaintiff afterwards lost such bill out of his possession, and from thence hitherto the same has remained so lost, and the plaintiff has been unable to produce it, and

ceased to have any power or control over it; and the defendant has never since such loss found such bill, nor known where it was to be found, nor had any power or control over it:—*Held*, that the plea was bad in substance, for not alleging that the bill was lost at maturity.

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control over it; and the defendant has never since such loss found such bill, nor known where it was to be found, nor had any power or control over it."

General demurrer, and joinder.

Atherton, in support of the demurrer (January 17).—The plea is bad upon two grounds:—first, it is bad because it does not contain any allegation that the bill of exchange, which the defendant relies upon as an answer to the plaintiff's claim, had been indorsed by the plaintiff, so as to confer a title to a third party to sue upon it. In the absence of such an averment, the plaintiff alone could recover the amount from the defendant.

Secondly, the plea is bad in not stating that the bill had not arrived at maturity at the time it was lost. *Hansard v. Robinson* (a) and *Ramuz v. Crowe* (b) are authorities, that an action cannot be maintained on a negotiable instrument without its production. In the former case the decision rests upon the ground, that the party to whom the bill has been given shall not put the loss upon the debtor's shoulders. If the plaintiff had lost the instrument after it had become over-due, it would not confer a better title upon the holder than the plaintiff possesses. It will be contended by the defendant, that the plaintiff ought to have replied the facts for the omission of which the plea is objected to, on the ground that they are facts peculiarly within the plaintiff's own knowledge, and ought therefore to be proved by him. The defendant, however, is bound to disclose in his plea such a defence as is in substance an answer to the plaintiff's claim, although he may have a difficulty in proving it.

Macnamara in support of the plea.—The plea affords a good and substantial answer to the plaintiff's claim.

(a) 7 B. & C. 90.

(b) 1 Exch. 167.

First, the case of *Ramaz v. Crowe* is an answer to the plaintiff's first objection to the plea, for there the bill was payable to the plaintiff's order, and was not indorsed.

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Secondly, *Hansard v. Robinson* shews that, whether the bill was due or not at the time of the loss, does not affect the question. By the law merchant, the acceptor is entitled to have the bill given up to him for his own security. If the holder of such an instrument loses it, he has been guilty of negligence, the consequences of which ought not to be borne by an innocent party. The loser of the bill may enforce payment of it in a Court of equity upon tender of an indemnity, and perhaps he has a further remedy under 9 & 10 Will. 3, c. 17, s. 3: Bayley on Bills, p. 140. The principles laid down by the Court in *Hansard v. Robinson*, which was followed by *Woodford v. Whiteley* (a), govern the present case. [*Parke, B.*—In *Price v. Price* (b), a plea similar to the present was held bad for not averring either that the note was still running, or that it had been indorsed over by the plaintiff.] The fact of the indorsement of the bill by the plaintiff, and of the time when the loss took place, are matters of which the plaintiff is cognisant, and he ought to have replied them in answer to the plea, which is *prima facie* a defence to the action.

Atherton replied.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B., (after stating the pleadings, his Lordship proceeded):—We are of opinion that the plea in this case is bad in substance.

The law upon the subject of lost bills may be considered, as settled by the decided cases, to be this:—If a negotiable bill or note, that is, a bill payable in its original

(a) 1 Moo. & M. 517.

(b) 16 M. & W. 232.

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state to bearer or order, be lost at the time a party to it is called on to pay, the loss constitutes a good defence: otherwise, if it be not in its original state a negotiable bill or note, as where it is payable to the payee only.

The former of these propositions is supported by the well-considered judgment of the Court of King's Bench in the case of *Hansard v. Robinson (a)*, which does not confine the necessity for the production of the bill or note by the plaintiff to the cases where it was payable to bearer originally, or became so by indorsement in blank, (as indeed the bill in that case did); but Lord *Tenterden*, in giving the judgment of the Court, lays down the position generally, that the law merchant requires the production of the instrument before a party to it can be called on to pay it. And this case was followed in *Ramuz v. Crowe (b)*. The case of *Wain v. Bailey (c)*, however, decides that this doctrine applies only to *negotiable* bills. The loss of a note or bill payable to the payee only is no answer to an action by him.

The bill given in the present case was a negotiable bill, and therefore its loss *at maturity* or afterwards, when the plaintiff should sue on it, would have been an answer to an action at his suit, on the bill, and probably to this action on the consideration for which the bill was given.

But the loss of a bill *not yet arrived at maturity* is immaterial. The bill may be found before it is due, and then the previous loss is not of the least consequence.

The plea must be taken most strongly against the defendant; and if we assume the bill to be still running, which we ought to do, the loss of it in no way affects the plaintiff's case.

For this reason, we are of opinion that our judgment should be for the plaintiff.

Judgment for the plaintiff.

(a) 7 B. & C. 90.

(b) 1 Exch. 167.

(c) 10 A. & E. 616.

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ROBERTSON and Another v. WAIT and Another.

Jan. 13.

ASSUMPSIT.—The declaration stated that, by a charterparty of affreightment, made between the defendants, owners of the vessel “James Watt,” then lying in the port of Liverpool, of the one part, and the plaintiffs, of Liverpool, merchants, of the other part, it was mutually agreed, that the said ship, being tight, staunch, &c., should, with all convenient speed, receive and take on board a full and complete cargo of salt, not exceeding 700 tons, and, being so loaded, should therewith proceed to Calcutta, and deliver the same agreeably to bills of lading; in consideration whereof the plaintiffs promised to load, &c., and pay as freight for the use of the vessel at and after the rate of 25s. sterling per 20 cwts., &c. “The vessel to be consigned to Messrs. Ewing & Co., merchants at Calcutta, on the usual and customary terms.”—The declaration then averred, that the defendants received on board the ship a cargo of salt, for the purpose of being carried on the voyage to Calcutta, and assigned as a breach (amongst others), that, although the ship, so loaded, sailed from Liverpool, and arrived at Calcutta, and although the Messrs. Ewing & Co., in the charterparty mentioned, were ready and willing to be and act as consignees of the vessel, on the usual and customary terms: yet, the defendants consigned the vessel to Messrs. Ewing & Co. on other than the usual and customary terms; “by reason whereof the plaintiffs lost great gains and commissions, and shares of commissions, and also lost the right of receiving, and were prevented from receiving, divers large sums and shares of commission, which were (to wit, by agreement theretofore, and before the making of the charterparty, made between the plaintiffs and Ewing & Co.) to be payable by Ewing & Co. to the plaintiffs, if the ship had been consigned to Ewing & Co. according to the charterparty on the usual and cus-

The plaintiffs chartered a vessel of the defendants to carry a cargo from Liverpool to Calcutta. The charterparty contained a clause that the vessel was to be consigned to E. & Co., merchants at Calcutta, on the usual terms. One of those terms was, that E. & Co. might procure the homeward freight at 5l. per cent. commission. The defendants consigned the vessel to E. & Co., but contracted with another party for the homeward freight. The plaintiffs, having agreed with E. & Co. for a share in the commission, brought an action against the defendants for their breach of contract, but failed to prove in what proportion the commission was to be divided:—*Held*, that as the clause was inserted for the benefit of E. & Co., the plaintiffs were entitled to recover as trustees on their behalf, notwithstanding they failed to shew their interest in the commission.

ing they failed to shew their interest in the commission.

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tomary terms, and which commission would have been earned by Ewing & Co. in respect of their acting as agents of and for the ship and defendants, in and about and with respect to the homeward voyage of the ship from Calcutta to England, and which commission, in consequence of the defendants' said breach of promise, Ewing & Co. could not and did not gain."

Pleas, not assumpserunt, and that the vessel was consigned to Ewing & Co., according to the charterparty, on the usual and customary terms.

At the trial, before *Wightman*, J., at the Liverpool Summer Assizes, 1852, it appeared that, in February 1851, the plaintiffs chartered a vessel of the defendants, called the "*James Watt*," to proceed from Liverpool to Calcutta with a cargo of salt. The charterparty contained a clause that the vessel was to be consigned to Messrs. Ewing & Co., merchants at Calcutta, on the usual and customary terms. One of the usual and customary terms was, that the consignees might procure the homeward freight at 5*l.* per cent. commission, which, in this case, amounted to 14*l.* 12*s.* 6*d.* The vessel was consigned to Ewing & Co., and they were ready with a homeward freight; but before the arrival of the vessel abroad, the defendants had contracted with another party to supply the homeward freight. For the purpose of proving the special damage alleged, parol evidence was tendered of an agreement between the plaintiffs and Ewing & Co., by which the former were to receive one-half of the commission on the homeward freight. It appeared, however, that the agreement was in writing, and, not being produced, the evidence was rejected. It was thereupon objected that the plaintiffs could only recover nominal damages. On the part of the plaintiffs it was submitted, that as it did not appear in what proportions the commission was to be divided, the plaintiffs were entitled to recover the whole in their own right; or if not, inasmuch as the contract was made with them for the benefit of Ewing & Co., who had ratified it by accepting the

consignment and procuring a homeward freight, the plaintiffs were entitled to recover as trustees for Ewing & Co. The learned Judge ruled otherwise, and a verdict was entered for the plaintiffs with 1s. damages, leave being reserved to them to move to increase the damages to 147l. 12s. 6d.

A rule nisi having been obtained accordingly,

Rew (*Watson* with him) now shewed cause.—The plaintiffs failed to prove that they had sustained any damage. It is said that they are nevertheless entitled to recover as trustees for Ewing & Co. They do not, however, profess to sue in that character, but for their own benefit. The damage alleged is, that they have been prevented from receiving a share of the commission which would have been earned by Ewing & Co. The chance of the plaintiffs' getting some collateral benefit from the contract is not sufficient to entitle them to recover the whole damage. Whether or not they were in fact trustees would only appear by the agreement. *Lamb v. Vice* (a) and *Stansfeld v. Hel-lawell* (b) stand on a different foundation: for those were cases of bonds taken by obligees in a judicial character, not for their own benefit but for the benefit of the suitors. Here Ewing & Co. were no parties to the charterparty, and were under no obligation to load upon the usual terms. Moreover, they could not have compelled the plaintiffs to sue for their benefit. The same reason which prevents Ewing & Co. from suing on this contract, will prevent the plaintiffs from recovering on their behalf, namely, that Ewing & Co. were in every sense strangers to the contract. [*Martin*, B.—If a person makes a contract whereby another obtains a benefit, why may not the former sue for it? *Parke*, B.—What is the object of inserting the particular clause in the charterparty, except for the benefit of Ewing & Co., and in order that they may receive commission on the homeward freight? Therefore, in that respect, the contract was made on their behalf.]

(a) 6 M. & W. 467.

(b) 7 Exch. 373.

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Wilkins, Serjt., and *Aspland* appeared to support the rule, but were not called upon to argue.

PARKE, B.—I entertain no doubt whatever that the plaintiffs are entitled to recover the whole amount as trustees for Ewing & Co.

It was then arranged, that the verdict should be entered for an amount which had been previously offered by the defendant's counsel.

Rule absolute accordingly.

Jan. 21.

MORGAN, Administrator of THOMAS MORGAN, deceased, v.
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The doctrine of relation, by which the letters of administration are held to relate back to acts done between the death of the intestate and the taking out of the letters of administration, exists only in those cases where the act done is for the benefit of the estate.

The widow of an intestate remained in the possession of her husband's property for some time after his decease. The intestate's son did not interfere in any way with the property, which

TROVER for household furniture. Pleas, not guilty, and not possessed; upon which issues were joined.

At the trial, before *Crompton*, J., at the last Carmarthen Assizes, it appeared that the action was brought by the plaintiff, as administrator of his father Thomas Morgan, for the recovery of the value of certain furniture which had been seized by the defendant as sheriff of the county under a writ of fi. fa. The intestate had resided for some years in the town of Carmarthen, and died in September, 1849. His wife and two daughters continued to reside in the house which they had occupied, but the plaintiff lived in a different part of the town. In February, 1851, the furniture of this house, which the widow so occupied, was seized under a writ of fi. fa., upon a judgment obtained against her. The plaintiff served a notice on the defendant not to sell the goods, as being part of the intestate's estate, and not the widow's. The defendant, how-

was seized under a writ of fi. fa. issued against the widow. The son afterwards took out letters of administration:—*Held*, first, that there was no evidence of the administrator's assent to the widow's taking the property; and, secondly, that if such an assent could be implied, the estate was not bound by it, as the act to which the assent was given did not benefit the estate.

ever, sold the goods, after having taken an indemnity from the execution plaintiff. In the following month of March, the plaintiff took out administration to his father, and subsequently brought this action to recover the value of the goods so seized and sold. Under these circumstances, it was contended, on the part of the defendant, that if the jury should be of opinion that the plaintiff had, after his father's death and before the taking out of administration, assented to the property of the intestate being taken by his mother and the other children, in satisfaction of their shares in the intestate's personal estate under the Statute of Distributions, the defendant was entitled to a verdict. The learned Judge left that question to the jury, who found that "the plaintiff had tacitly assented, but that he had done no act." On the part of the plaintiff it was contended, that, although the letters of administration had such a relation as would maintain the action, *Tharpe v. Stallwood* (a), yet there was no evidence of any assent on the part of the defendant as administrator; and if there was such evidence, that, inasmuch as it did not appear that there were no debts due from the estate unpaid, such assent, not being for the benefit of the estate, was of no effect. A verdict was entered for the plaintiff for the sum of 11*l.* 2*s.* 9*d.*, with leave to the defendant to move to set that verdict aside, and to enter a nonsuit.

Evans obtained a rule nisi accordingly, or for a new trial.

Davison (*Bowen* with him) shewed cause, and contended, first, that there was no evidence from which a jury would be warranted in finding that there was any assent on the part of the plaintiff; and secondly, that such an assent not being for the benefit of the estate, the subsequent letters of administration did not, by virtue of the

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(a) 5 M. & Gr. 760.

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relation back to the assent, render it effectual.—He was then stopped by the Court.

Evans and Grove, in support of the rule.—(First, they contended that there was evidence of assent by the plaintiff.)—Secondly, assuming that there was an assent by the plaintiff, the subsequent taking out of letters of administration by him may fairly be treated as a ratification of an act which he did in the performance of his duty as an administrator. There are several authorities which shew that the letters of administration have this relation back to the act of the party who subsequently becomes administrator: *Foster v. Bates* (a), *Woolley v. Clark* (b), *Kerrick v. Burges* (c). In the latter case it was said by the Court, that, if one enter as executor de son tort and sells goods, and then purchases administration, the sale is good by relation. *Curtis v. Vernon* (d) and *Waring v. Dewberry* (e) are in the defendant's favour. [*Parke, B.*—Where the party's acts are for the benefit of the estate, and in the lawful course of administration, these are binding upon him. But how can it be said that an assent to a legacy, where it is not shewn that there are sufficient assets to meet the debts, can be for the benefit of the estate? A person who stands by and does nothing, where he has no power to dissent from the act which is taking place, cannot be considered as assenting to it. This is so upon the principle contained in the two following legal maxims: "Qui non prohibet quod prohibere potest, assentire videtur;" and "Qui non obstat cui obstare potest, facere videtur."] *Whitehall v. Squire* (f) is expressly in the defendant's favour: there the plaintiff, having received a horse belonging to the intestate from the defendant, in remuneration of ser-

(a) 12 M. & W. 226.
 (b) 5 B. & Ald. 744.
 (c) Moore, 126.

(d) 3 T. R. 587.
 (e) 1 Str. 97.
 (f) 1 Salk. 295.

vices performed at the request of the defendant about the funeral of the intestate, afterwards administered to the intestate, and brought trover against the defendant for the value of the horse so received by himself before he became administrator, and the defendant was held to be entitled to judgment by the majority of the Court. [*Parke, B.*—The decision in that case was explained by Lord *Ellenborough, C. J.*, in *Mountford v. Gibson* (a), where he says: “By Lord *Holt’s* opinion, the plaintiff should have recovered; and he never intimated that the delivery, being made by one acting as executor de son tort, would be a bar to an action by the rightful administrator; and the other two Judges, who differed from him in the conclusion, never questioned the right of the administrator to maintain such an action in general; but they held that the plaintiff, being particeps criminis in the very act he complained of, should not be permitted to recover upon it against the person with whom he had colluded.” In *Kenrick v. Burges*, the observation relied upon for the defendant was not the point in dispute, but was a mere dictum of the Court. The general principle is, that the administration has relation back only in those cases where the act to be ratified is for the protection and benefit of the estate. *Stewart v. Edmonds* (b) is directly opposed to the defendant’s argument. There is also the case of *Parsons v. Mayesden* (c), which is to the same effect.] Consequences of great inconvenience might be the result of a decision, that acts done by the party, or assented to by him, who long afterwards obtains the administration of the estate, may be rendered of no effect.

POLLOCK, C. B.—I am of opinion that this rule ought to be discharged. Unless the conduct of the party whose

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(a) 4 East, 445. (b) 1 Wms. Exors. 334, n. (u). (c) Freem. 152.

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act is relied upon as binding the estate of the intestate be done by him in the character of administrator, it can have no operation upon the estate, and, accordingly, the utmost effect that can be given to the defendant's argument is, that where a party does an act professedly intending to take out letters of administration, and afterwards becomes administrator, the administration has relation back, and gives effect to what he had done by anticipation. But if that proposition be true in point of law, this case would entirely fail upon the facts, for there was no evidence whatever to warrant the jury in finding that the plaintiff had assented. Upon considering all the facts, there is no evidence bearing out the proposition of an assent, although it is true that the plaintiff was living at the time in the neighbourhood, and was probably aware of what the parties were doing, and did not choose to interfere; yet it does not follow that he was acting in the character, or even in the assumed character, of administrator. With respect to the legal consideration of the case, the only matter adduced by the defendant's counsel, which is in the least in his favour, is what fell from the Court of King's Bench in *Kenrick v. Burges*, and which turns out to have been a mere dictum, although, no doubt, the Judges entertained that view of the question. But the modern authorities are opposed to the defendant's arguments, and, amongst other cases, that of *Woolley v. Clark* may be cited.

PARKER, B.—I am of the same opinion; and I do not entertain a doubt upon the question. In the first place, there is no evidence whatever for the jury that the plaintiff ever assented, before he took out letters of administration, to the widow's taking this property as her share of the intestate's goods under the Statute of Distributions; because the principle is, that no consent can be implied against a

person who has no power to dissent; and this principle is illustrated by the two legal maxims to which I have already referred. It is only where a man has the power of prohibiting a thing, that his omitting to exercise that power is evidence of his assent. Now at the time the intestate's widow took possession of this property, the plaintiff had no power to prevent her from so doing. He had no interest in the goods, and no power to take them away from her; and therefore, as he had no power to dissent, he did not assent by not interfering in the matter. Even supposing that he had in the most solemn manner, by an instrument under his hand and seal, assented to her doing so, it is perfectly clear from all the modern authorities, which are uniform upon the question, that she would not have thereby acquired a right to claim the property. An act done by a party who afterwards becomes administrator, to the prejudice of the estate, is not made good by the subsequent administration. It is only in those cases where the act is for the *benefit* of the estate that the relation back exists, by virtue of which relation the administrator is enabled to recover against such persons as have interfered with the estate, and thereby to prevent it from being prejudiced and despoiled. It was not the duty of the plaintiff, acting in the character of administrator, to assent to a legacy till he had seen all the just debts owing by the estate duly satisfied.

ALDERSON, B.—There was no evidence to warrant the jury in finding that the plaintiff assented; and that being so, there is nothing to which the relation back can have reference.

MARTIN, B.—There is no evidence whatever to entitle the jury to find that the plaintiff has given such an assent as that contended for; and upon this ground alone the rule might be discharged. Upon the other point, the

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authorities are also clear. With regard to the objection, that inconvenience might arise if a person were to be deprived of property of which he had been in possession for many years, say for twenty years, by administration being taken out, it seems to me that it might fairly be left to the jury to say, whether such property had not come into the possession of the party by gift or by will.

Rule discharged.

Jan. 19.

FREMLIN v. SIR J. J. HAMILTON, Bart., and Others.

A declaration stated, that the plaintiff sued the defendants as executors of J. C.; that J. C., being seised in fee of certain messuages and premises, by an agreement dated &c., agreed with the plaintiff as follows:—

“Memorandum of agreement made on &c. between J. C., of the one part, and J. F. (the plaintiff), of the other. The said J. C. agrees to let, and the

said J. F. (the plaintiff) agrees to take, all that (describing the premises), to hold unto the said J. F. (the plaintiff), from &c., for the term of two years, at the yearly rent of &c.; and in consideration thereof, and provided the said J. F. (the plaintiff) shall pay the rent and observe the agreements and stipulations hereinbefore contained on his part, the said J. C. for himself &c. agrees with the said J. F. (the plaintiff), that he the said J. C., his heirs, &c. will grant unto the said J. F. (the plaintiff), a lease of all the premises for the term of twenty-one years, at a clear yearly rent, to be fixed according to a valuation to be made in the usual way, which lease shall contain all the covenants &c. contained in the draft of a lease (now produced). And the said J. F. (the plaintiff) agrees with the said J. C. to accept the said lease, and to execute a counterpart thereof &c. To all which both parties agree. Witness J. W. (Signed) J. C.” The declaration contained various averments of performance on the part of the plaintiff, and alleged, as a breach, that the defendants had not nominated a valuer, whereby no clear yearly rent of the said farm was fixed, and whereby no lease was ever executed to the plaintiff:—*Held*, that the declaration was bad in substance, in not stating any consideration for the alleged agreement on the part of J. C., the testator.

agrees to take, all that newly-erected messuage [describing the premises]: To hold unto the said J. Fremlin from the 25th day of March instant for the term of two years, at the yearly rent of 4*l.*, payable quarterly, on the 24th day of June, the 29th day of September, the 25th day of December, and the 25th day of March, in each year. And the said J. Fremlin agrees with the said Sir J. Cockburn to pay the said yearly rent in manner aforesaid, and to bear, pay, and discharge all rates &c.; and, during the said term, cultivate and use in a good and husbandlike manner all the said lands &c. And in consideration thereof, and provided the said J. Fremlin shall well and truly pay the rent, and perform and observe the agreements and stipulations hereinbefore contained on his part to be paid, performed, and observed, the said Sir J. Cockburn, for himself, his heirs and assigns, agrees with the said J. Fremlin, his executors and administrators, that he the said Sir J. Cockburn his heirs or assigns, will grant unto the said J. Fremlin, his executors or administrators, a lease of all the said messuage, lands, and premises, for the term of twenty-one years, to commence from the expiration of the said term of two years (determinable at the end of the seventh or fourteenth year by either party, on giving six calendar months previous notice in writing to the other of them, of his desire so to determine the term) at a clear yearly rent to be then fixed according to a valuation to be made in the usual way; such lease to be executed immediately after the said yearly rent shall be so fixed; in which lease shall be contained all such exceptions, reservations, and privileges in favour of the said Sir J. Cockburn, his heirs or assigns, and all such and the like covenants, clauses, conditions, and stipulations, on the part of the lessor and lessee, and proviso for re-entry, as are contained and set forth in a draft of a lease (now produced) dated 31st of December, 1847, being of the said lands and premises, and made between the said Sir J. Cockburn of the one part,

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and James Phillips of the other part. And the said J. Fremlin, for himself, his heirs, executors, and administrators, agrees with the said Sir J. Cockburn, his heirs and assigns, that he the said J. Fremlin, his executors or administrators, shall and will take and accept the said lease so agreed to be granted as aforesaid, and to execute a counterpart thereof, the said lease and counterpart to be prepared by Sir J. Cockburn's solicitor, at the said J. Fremlin's expense. And in order that no unnecessary delay may take place in the granting of such lease as aforesaid, each of the said parties hereto agrees that he will forthwith, at the expiration of the said two years, do all necessary and reasonable acts and things to cause the said valuation to be proceeded with and completed, to all which both parties agree.—Witness their hands. Witness John Wright—J. Cockburn.' And the plaintiff avers, that he did perform and observe all the agreements and stipulations in the said agreement contained." The declaration contained further averments, that Sir J. Cockburn died before the expiration of the said term of two years, having previously sold and assigned the said messuage &c.; and that the defendants became his executrix and executors. That the plaintiff thereupon gave notice to the heir and assign, and also to the defendants, as such executors and executrix respectively, that the plaintiff had chosen and nominated one G. Mandy, of &c., surveyor, being an indifferent person, to be his valuer for making a valuation in the usual way, for the purpose of assisting in fixing the said clear yearly rent, and then requested the said heir and assign, and also the defendants, respectively, to choose and nominate, and notify, within a reasonable time from and after the service of the said notice upon them, to the attornies of the plaintiff or to the said G. Mandy, some indifferent person as a valuer on the part of the said heir and assign, or the defendants, for making a valuation in the usual way, for the purpose of ascertaining and fixing, together with the said G. Mandy, the said clear yearly rent; and that the plain-

tiff further gave notice to the said heir and assign, and to the defendants respectively, that, in the event of the said indifferent person and the said G. Mandy being unable to agree in making the valuation in the usual way for fixing the said yearly rent, the valuation would be made by an umpire, to be appointed in the manner usual and accustomed in such cases, the above-mentioned proceeding being the proper mode of fixing the said clear yearly rent, and the usual way of making the valuation according to the true intent and meaning of the said agreement; and that the plaintiff further gave to the heir and assign, and to the defendants respectively, notice to execute, immediately after the said yearly rent should be so fixed as aforesaid, to the said plaintiff a valid lease pursuant to the said agreement; but that neither the said heir, nor the assign, nor the defendants, nor either of them, have chosen, nominated, or notified at any time to the attornies of the plaintiff, or to the plaintiff, or to the said G. Mandy, any indifferent person or any person whatever as a valuer on their part, for making a valuation in the usual way for the purpose of ascertaining and fixing together with the said G. Mandy the said yearly rent, nor did they cause any valuation whatever to be made, by reason whereof no clear yearly rent of the said farm was fixed, nor was any lease ever executed to the plaintiff, whereby the plaintiff had sustained special damage in this, &c.

General demurrer, and joinder.

Honyman, in support of the demurrer.—The declaration is open to numerous objections, the first of which is, that it does not disclose any consideration whatever for the alleged agreement on the part of the testator.—He was then stopped by the Court.

Horn, contra, submitted that the declaration was not open to any technical objection which might have been raised to it before the Common Law Procedure Act came into operation.

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PER CURIAM (a).—The declaration is clearly bad, for the reason assigned. The Procedure Act has no doubt afforded great latitude in pleading; but it has not removed the necessity of stating a consideration for an agreement upon which a party is sought to be charged. The plaintiff may have leave to amend in a week, otherwise there will be judgment for the defendant.

Amendment accordingly.

(a) *Pollock, C. B., Parke, B., Alderson, B., and Martin, B.*

Jan. 22.

AVARDS and Wife, App.; RHODES, Resp.

The county court has no jurisdiction to try a cause where the plaintiff, on the face of the summons, claims a sum exceeding 50*l.*, although he thereby also proposes to allow a set-off to reduce it below that sum, where such set-off has not been allowed by the defendant before action, or admitted by him at the trial.

In such case the county court cannot obtain jurisdiction by the plaintiff's offering at the trial to abandon the excess above 50*l.*

THIS was an appeal from the county court of Kent, holden at Tunbridge Wells, and arose from an action brought in that county court to recover compensation for services rendered by Mahala Avars, the wife of Thomas Avars, the plaintiff in the action, to the defendant.

The particulars of the plaintiffs' demand, which were annexed to the summons issued in this cause, were as follows:—

"In the County Court of Kent, at Tunbridge Wells.

"Between Thomas Avars and Mahala, his Wife . Plaintiffs,
 and

"Edward Rhodes Defendant.

"Particulars of Plaintiffs' Demand.

"Mr. Edward Rhodes, Dr.

| | | | |
|--|----|----|----|
| "To 13 weeks' service of Mahala Avars, from October 11th, 1841, to January 11, 1842, at 4 <i>s.</i> per week | £ | s. | d. |
| | 2 | 12 | 0 |
| To 3 years' service from January 11, 1842, to January 11, 1845, at 3 <i>s.</i> 6 <i>d.</i> per week | 27 | 6 | 0 |
| To 3 years and a half service from January 11, 1845, to July 18, 1848, at 3 <i>s.</i> per week | 27 | 6 | 0 |

| | | | |
|--|----|---|---|
| Paid by defendant on plaintiffs' behalf at different times | 57 | 4 | 0 |
| | 15 | 0 | 4 |

| | | | |
|-------------------------------------|----|---|---|
| Received by cash at different times | 4 | 0 | 0 |
| | 19 | 0 | 4 |

38 3 8"

An objection was taken on the part of the defendant, that the amount of the plaintiffs' claim exceeded the sum of 50*l.*, and that therefore the court had no jurisdiction to try the cause. In answer to this objection, it was suggested that the defendant had given notice of the set-off stated in the particulars of demand in a former action, which had been brought in the same court by the said Mahala Avards alone against the said defendant, in which action the plaintiff was nonsuited, on the ground that she was a married woman; but there was no evidence tendered of an account stated, or of any settled and agreed balance between the parties.

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The judge decided that he had no jurisdiction to try the cause, the plaintiffs not being at liberty to introduce matter of set-off to bring their claim within the jurisdiction of the court.

The plaintiffs then offered to abandon so much of the said sum of 57*l.* 4*s.* as exceeded the sum of 50*l.*, so as to bring their claim within the jurisdiction of the said court; but the Judge decided, that this was not a case in which the plaintiffs were at liberty to abandon the excess at the trial, and nonsuited the plaintiffs.

The questions for the opinion of this Court were:—

First, whether the plaintiffs could, by the admission of payments, and by introducing matter of set-off, bring the case within the jurisdiction of the court.

Secondly, whether the plaintiffs ought to have been allowed at the trial of this cause to abandon so much of the said sum of 57*l.* 4*s.* as exceeded the sum of 50*l.*, so as to bring their claim within the jurisdiction of the said court.

Macnamara for the appellants (Jan. 17).—It may be more convenient to consider the second question submitted for the opinion of this Court first in order. Assuming, therefore, that the plaintiffs' claim did exceed 50*l.*, the

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question is, whether they were not entitled to abandon the excess, as they proposed to do, on the hearing. This depends on the 58th and 63rd sections of the 9 & 10 Vict. c. 95. By the 58th section, it is enacted, that "all pleas of personal actions where the debt or damage claimed is not more than 20*l.*, whether on balance of account or otherwise, may be holden in the County Court without writ." And the 63rd section enacts, that "it shall not be lawful for any plaintiff to divide any cause of action for the purpose of bringing two or more suits in any of the said courts; but any plaintiff having cause of action for more than 20*l.* may abandon the excess, and thereupon the plaintiff shall, on proving his case, recover to an amount not exceeding 20*l.*; and the judgment of the court upon such plaint shall be in full discharge of all demands in respect of such cause of action, and entry of the judgment shall be made accordingly." The jurisdiction of the County Court was extended to the trial of causes from 20*l.* up to 50*l.*, by the 13 & 14 Vict. c. 61, s. 1, which in effect incorporates the above sections. There is no provision in the 9 & 10 Vict. c. 95, which limits the power of the plaintiff to abandon the excess on the hearing. In *Isaac v. Wyld* (a), *Parks*, B., in delivering the judgment of this Court, said, that "the most reasonable course undoubtedly is, that the abandonment should be on the face of the summons or particulars annexed, so that the defendant may at once acquiesce, if he is so minded, instead of being obliged to be at the trouble and expense of attending the County Court, in order to compel the plaintiff to abandon the excess above 50*l.* on the hearing, but there is no express provision to this effect in the Act of Parliament; and the language of the 63rd section, though equivocal, seems rather to intimate that the abandonment may be on or before the hearing." Expressions by the learned Judges to the same effect are to be found in

(a) 7 Exch. 163.

the cases of *Vines v. Arnold* (a) and *Brunskill v. Powell* (b). If the abandonment were not allowed at the hearing, much inconvenience might be the result, as nice questions frequently exist, which can only be properly determined when the facts of the case have been elicited.—He was then stopped by the Court, who called upon

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Bovill, contra.—If the first question be decided in the respondent's favour, the second question becomes wholly immaterial. The judge decided that he had no jurisdiction, and the correctness of that decision depends upon the true construction of the 58th section of the 9 & 10 Vict. c. 95, by which the plaintiffs' claim, after balance of account or otherwise, must not exceed 50*l*. In *Isaac v. Wyld*, the claim, as stated in the plaint and summons, did not exceed 50*l*., and therefore *prima facie* the county court had jurisdiction. A claim which exceeds 50*l*., though reduced below that amount by a set-off, affords good ground for a prohibition: *Beswick v. Capper* (c), *Woodhams v. Newman* (d). The 63rd section, therefore, which permits the abandonment of the excess, does not apply to this case. With respect to the argument of inconvenience, it may be said that the legislature never intended to give a plaintiff the option of suing out a plaint for a sum exceeding 50*l*.; for if he might do so, there is no reason why he should not claim a debt of 10,000*l*., and reduce his claim at the hearing to a small amount. There is no provision in these Acts by which a plaintiff may issue a plaint for any such large amount.

Macnamara, in reply.—It is contended, on the part of the respondent, that the form of these particulars of demand ousts the county court of its jurisdiction; but in fact the plaintiff by them claims only 38*l*. 3*s*. 8*d*. In *Bes-*

(a) 8 C. B. 632.

(b) 19 L. J., Exch., 362.

(c) 7 C. B. 669.

(d) 7 C. B. 654.

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wick v. Capper, the plaintiff did not offer to abandon the excess. *Kimpton v. Willey* (a) is a direct authority in the appellants' favour; for it is to be gathered from that case that the judge may inquire into the whole case, for the purpose of seeing whether the plaintiff's claim does or does not exceed 50*l*. It is frequently a difficult matter to say whether a particular sum, which a plaintiff is willing to allow, be a payment or a set-off; and it may be impossible to determine which of the two it is, until the whole case has been heard.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—(After stating the case, his Lordship proceeded):—The questions submitted by the learned Judge are, whether the plaintiffs could, by the admission of payment, and on introducing matter of set-off, bring the case within the jurisdiction of the court.

Secondly, whether the plaintiffs ought to have been allowed at the trial of the cause to abandon so much of the sum of 57*l*. 4*s*. as exceeded the sum of 50*l*., so as to bring this cause within the jurisdiction of the court.

We are of opinion that the learned judge was right on both points.

The jurisdiction of the county court, by the 58th sect. of the 9 & 10 Vict. c. 95, extends to "all pleas of personal actions, where the debt or damage *claimed* is not more than 20*l*., whether on *balance of account* or otherwise." The term "*balance of account*" means after payment of part, or after the allowance of set-off as an item in account with the agreement of the parties, which is equivalent to payment of part, and not when the plaintiff claims more than 20*l*. after a simple set off. This was so held in *Woodhams v. Newman* (b) and *Beswick v. Capper* (c); and in

(a) 19 L. J., C. P., 269. (b) 7 C. B. 654. (c) 7 C. B. 669.

the latter case, where the plaintiff sued for 20*l.* only, as the balance of an account originally of 175*l.*, but reduced by a proposed set-off, the Court of Common Pleas granted a prohibition. Since that time, the 13 & 14 Vict. c. 61, s. 1, has extended the jurisdiction to 50*l.*, subject to the same limitations. In the case now under consideration, the plaintiffs claimed more than 50*l.* Their demand was for 57*l.* 4*s.*, subject to a reduction by payment of 4*l.*, which diminished it to 53*l.* 4*s.*, and against which they proposed to allow what, on the face of the particulars, was no doubt a mere set off, 15*l.* 4*d.* But this set off had never been allowed before action by the defendant, so as to constitute a part payment; nor did the defendant offer to admit it on the trial, at least nothing of that sort is stated in the case: consequently, it was really a demand for 53*l.* 4*s.*, and a demand on the face of the summons, and which the plaintiffs would have to prove; and this is a demand which the County Court had no jurisdiction to try.

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It was, however, contended, that the case of *Kimpton v. Willey* (a) laid down a different doctrine from that on which the above-cited cases proceeded, and decided that a person might sue for more than 50*l.*, and reduce his claim afterwards, by allowing a set-off or abandoning the excess beyond 50*l.* From the report, in both the Law Journal and Lowndes, Maxwell, and Pollock, as to the opinions of *Wilde*, C. J., and my Brothers *Williams* and *Cresswell*, it would appear that the ground on which the rule for a prohibition was discharged was, that the affidavits were not sufficient to shew that there was an excess of jurisdiction. My Brother *Maule* is reported to have added that, with respect to claims above 20*l.*, there was only an implied prohibition from *giving judgment* for more than that amount, arising from the enabling clauses of the 53rd and 58th sections. But this is probably incorrectly reported,

(a) 19 L. J., C. P., 269; 1 L. M. & P. 280.

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as it seems to us at variance with the decision in *Beswick v. Capper*, and the words of the Act (sect. 58), that all pleas of personal actions where the debt or damage *claimed* is not more than 20*l.* may be holden in the county court. It cannot be that the Judge may investigate claims to any amount, provided his judgment does not exceed the limits of 50*l.* But, no doubt, where the plaintiff claims a balance of 50*l.* only, it may happen that the Judge may have to investigate demands to a much larger amount; and if there be a part payment or set-off agreed to, it may be required that the plaintiff is to prove a sum which will overtop that payment or set-off, and which may much exceed 50*l.*; but that is made necessary by the introduction into the Acts of the term "balance of account," that is, over and above all payments; but that is a very different case to a claim of a greater sum, with an offer of a set-off of one reducing the amount to or below 50*l.*

We think, therefore, that, according to the decision in these cases, the demand, originally exceeding 50*l.*, and being only reduced below it by offering to allow a set-off never agreed to as a part payment, was one over which the Court had no jurisdiction.

The offer to abandon the excess at the trial appears to us to make no difference, as the claim from the first was one over which the County Court had no jurisdiction. In that respect the case differs from *Isaac v. Wyld* (a), where the sum on the face of the summons and particulars did not exceed 50*l.*, but was taken out of the jurisdiction by the proof that it was a portion of a debt originally exceeding 50*l.*, and then the plaintiff was permitted to abandon the excess beyond 50*l.*

Judgment affirmed.

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M'KINNON and Another v. PENSON.

Jan. 25.

CASE.—The declaration, after stating that the defendant was surveyor of county bridges for the county of Cardigan, duly appointed according to the statute, recited that, at the time &c., there was a certain common public bridge in the county of Cardigan, in the Queen's common highway; that this bridge was not within any city or town corporate, and that it could not be known and proved that any hundred, riding, city, borough, or parish, or any person certain, or any body politic, ought of right to make, rebuild, repair, or amend the said bridge; and that the inhabitants of the whole county of Cardigan ought to make, rebuild, repair, and amend the said bridge when and as often as it should be necessary, according to the statute; and that after the passing of the 43 Geo. 3, c. 59, the bridge became very ruinous, broken, dangerous, and in great decay, for want of upholding, maintaining, amending, and repairing, so that the Queen's subjects could not pass the same without great danger &c. The declaration then proceeded to aver, that the inhabitants of the county of Cardigan, after the passing of the said statute, and up to the time of the injury thereafter mentioned, wrongfully, unlawfully, and negligently permitted the said bridge to remain so ruinous and in decay as aforesaid for want of upholding and repairing, although a reasonable time for the said inhabitants to have upheld and repaired it had elapsed before the said injury; that by means of the premises and after the passing of the said statute, one J. M'Eachan, a servant of the plaintiffs, who was lawfully driving in a carriage along the said highway over the said bridge, was precipitated with the carriage from the bridge into the water, whereby he was much injured; and that the plaintiffs were deprived of his services, and also lost

An action for a personal and peculiar damage resulting from the want of proper repair to a county bridge will not lie against the county surveyor, either at common law or under the statute 43 Geo. 3, c. 59.

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certain goods which were in the carriage at the time of the accident.

The defendant pleaded, first, not guilty; secondly, that a reasonable time for the said inhabitants to have repaired the said bridge had not elapsed before the said injury occurred. Upon which pleas issues were joined.

At the trial, before *Martin*, B., at the Carmarthenshire Spring Assizes, 1852, the plaintiffs obtained a verdict with 100*l.* damages.

In the following Easter Term, a rule nisi was obtained to arrest the judgment.

Benson, *Honyman*, and *Bowen* shewed cause in last Trinity Term (May 28).—The objection to this action is founded on the case of *Russell v. The Men of Devon* (a), which decided that no action will lie by an individual against the inhabitants of a county for an injury sustained in consequence of the non-repair of a county bridge. The main grounds of that decision were, that the inhabitants of a county are not a corporation; and that the damages, if recoverable, must be levied on one or two individuals, who would have no means of reimbursing themselves except by actions against other inhabitants; and this would give rise to a multiplicity of suits. That inconvenience is obviated by the 43 Geo. 3, c 59, s. 4, which enacts "That the inhabitants of counties shall and may sue for any damages done to bridges and other works maintained and repaired at the expense of such counties respectively, and for the recovering of any property belonging to such counties, in the name of their surveyor, and also shall and may be sued in the name of such surveyor; and no action or prosecution to be brought or commenced by or against the inhabitants of counties, by virtue of this Act, in the name of the said surveyor, shall abate or be

discontinued by the death or removal of such surveyor, or by the act of the surveyor, without the consent of the justices at their General Quarter Sessions assembled; but the surveyor for the time being shall be deemed the plaintiff or defendant in such actions, as the case may be: Provided always, that every such surveyor, in whose name any action or suit shall be commenced, prosecuted, or defended in pursuance of this Act, shall always be reimbursed and paid, out of the monies in the hands of the treasurer of the public stock of such county respectively, all such costs and charges as he shall be put unto or become chargeable with by reason of his being so made plaintiff or defendant therein, and also all the costs and charges of prosecuting any indictment or indictments or other proceedings against any person or persons whomsoever." That enactment clearly enables the county to sue in the name of their surveyor for damage done to bridges; then why may not an individual who has sustained a particular injury by reason of the non-repair of a bridge, sue the county in the name of their surveyor? [*Pollock*, C. B.—It seems to me that the legislature never intended by that statute to create a new liability, but only to afford a more convenient remedy against the county when they were liable. The title does not convey the least intimation of any intention to render the county liable to an individual for damage resulting from the non-repair of bridges.] If that were so, the party would be without remedy. [*Alderson*, B.—In Bro. Abr., tit. "Action sur le Case," pl. 93, it is said, "Cōen chymyn est irrepayer issint q̄ ieo mire mon chual, ieo naūa acē ʋs cesty q̄ doit reparer ceo car est popul' et serra reforme p̄ p̄sentm̄t qđ nota p̄ Heydone, et 6 (5 E. 4. 3);" that is, inasmuch as the highway ought to be repaired by the public, an injury arising from that neglect cannot be the subject of an action, but is only ground for the Crown interfering. According to the authority of *Russell v. The Men of Devon*, the county are not liable to an ac-

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tion unless there is some Act of Parliament which makes them so. Then, has the 43 Geo. 3, c. 59, s. 4, that effect? Now that statute makes no allusion to this particular matter, but only says generally, that the inhabitants of counties may sue for damage to bridges in the name of their surveyor, "and also shall and may be sued in the name of such surveyor." The true construction of that is, that, where the county are liable, the action may be brought against the surveyor; and then there is a provision, that the surveyor shall be reimbursed by the county. Suppose the person injured had died, could the surveyor have been indicted for manslaughter? There is strong ground for holding that the statute applies only to such proceedings, whether civil or criminal, as the inhabitants of counties were previously liable to.] The reason why, at common law, an action would not lie against the inhabitants of a county, was the difficulty as to the mode of suing them; it is therefore reasonable to conclude, that this statute was passed with the express object of obviating that difficulty. Where a person is bound to repair *ratione tenuræ*, and another sustains an injury through his neglect, the latter may maintain an action in respect of that injury, notwithstanding the former is also liable to an indictment. It is a maxim of law, that wherever there is a wrong, there is also a remedy. [*Pollock*, C. B.—That is not universally true. *Platt*, B.—*Ashhurst*, J., alludes to that in his judgment in *Russell v. The Men of Devon*, and observes, that "there is another general principle of law which is more applicable to this case: that it is better that an individual should sustain an injury, than that the public should suffer an inconvenience."] If the law casts any duty upon a person which he refuses or fails to perform, he is answerable in damages to those whom his refusal or failure injures: *Ashby v. White(a)*, *Ferguson v. The Earl*

(a) 2 *Ld. Raym.* 938; 1 *Bro. P. C.* 62.

of *Kinnoull* (a). In Co. Litt. 56. a, it is said, "If the lessee be disturbed of this way which the law doth give unto him, he shall have his action upon the case, and recover his damages, and this action the law doth give unto him; for, whensoever the law giveth anything, it giveth also a remedy for the same." [*Alderson*, B.—No doubt, where a person sustains an injury through the wrongful act, either of an individual or of a corporation, he may recover from them compensation in damages. But the only way in which the inhabitants of a county can be compelled to repair, is by presentment or indictment. If the declaration merely charges the county with not repairing within a reasonable time, it is doubtful whether it shews any liability at all; for they are not, like an individual, bound to repair within a reasonable time, but upon presentment. Indeed, this very statute contains a proviso, that no money shall be applied to the repair of bridges until after presentment (sect. 3). That confirms my view of the law, which the passage in Brooke's Abridgment shews was the law at that time.] In *Thomas v. Sorrel* (b), the Court considered that no action would lie against a county, because there was no person who could be sued; and they say that, "where there is no person against whom to bring the action, it is as if a man be damaged by one that cannot be known." As a general rule, an action lies for a neglect in doing that which by law a person ought to do: Com. Dig. "Action upon the Case for Negligence" (A 3), *Steinson v. Heath* (c). In *Henley v. The Mayor of Lyme Regis* (d) the principle was distinctly recognised, that, wherever an indictment lies for non-repair, an action on the case will lie at the suit of a party sustaining any peculiar damage. The 43 Geo. 3, c. 59, ought to be construed so as to extend the remedy: *Heydon's case* (e). The words "such costs and

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(a) 9 Cl. & F. 251.

(b) Vaugh. 340.

(c) 3 Lev. 400.

(d) 5 Bing. 91; in error, 1 Bing. N. C., 222; 8 Bligh, N. S., 690.

(e) 3 Rep. 7 b.

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charges," in the 4th section, mean any expenses which the surveyor may incur by reason of his suing or being sued. Under the Statute of Gloucester (6 Edw. 1, c. 1), he would not be liable to costs unless damages were recovered against him. The objection, that the inhabitants might vary between the time of action and judgment, would equally apply to an indictment or to proceedings upon the Statutes of Hue and Cry.—They also referred to 55 Geo. 3, c. 143, s. 5, and 12 Geo. 2, c. 29.

Knowles and Davison in support of the rule (Nov. 13).—The question, whether the present action can be maintained, will be found ultimately to depend upon the true construction of the 43 Geo. 3, c. 59. The authorities shew that, prior to that statute, no action could have been maintained in such case; and, although the passage from Vaughan, p. 340, cited by the plaintiffs' counsel, is in their favour, yet the more modern decision of *Russell v. The Men of Devon* (a), which was precisely similar to the present case, was a decision before the statute, that the inhabitants of the county could not be sued for an injury sustained by an individual, in consequence of a county bridge being out of repair. That decision was pronounced in the year 1788, and consequently the statute of 43 Geo. 3, c. 59, which was not passed until fifteen years afterwards, could not have been intended to remove the grievance which the decision in *Russell v. The Men of Devon* might shew to exist. That statute was in truth passed with a view to remove doubts which had arisen as to the extent of the liability of the inhabitants of the county to improve such bridges as were not sufficiently commodious to the public. This appears by the recital contained in the 1st section of the Act. In the case of *The Inhabitants of the County of Cumberland v. The King* (b), which was decided in the month of April, 1803, it was

(a) 2 T. R. 667.

(b) 3 Bos. & P. 354.

doubted whether the persons who were bound to repair a bridge, were also bound to widen it; and in June following the statute was passed. From these facts, it is clear what the view was which the legislature had in passing this Act. By the 1st section, surveyors of county bridges have the same powers vested in them, for the purpose of obtaining materials for the repairs of bridges, and certain other matters, as surveyors of highway had under the 13 Geo. 3, c. 78. The 2nd section, which empowers justices at General Quarter Sessions to direct bridges to be widened and improved, contains an important proviso, "that no money shall be applied to the amendment or alteration of any such bridge or bridges, until presentment shall have been made of the insufficiency, inconveniency, or want of reparation of such bridge or bridges, in pursuance of some or one of the statutes made and now in force concerning public bridges." This declaration may, therefore, perhaps be objectionable in omitting to state that a presentment had been made. [*Benson* referred to *Rex v. Houldgrave* (a), to shew the object of this section.] The question then will be, whether the 4th section gives the additional remedy which the plaintiffs now seek to enforce. It is submitted that the 4th section does not make the inhabitants of the county a corporation for all purposes, but that it merely makes it lawful for them to sue and be sued in the name of the surveyor in the two following cases: namely, where "damage is done to bridges and other works maintained and repaired at the expense of such counties respectively, and for the recovery of any property belonging to such counties." This section, therefore, does not create any new liability, except in those cases where new powers are given to the county by the other sections of the Act. In such cases, the surveyor is a mere nominal party, and is pointed out by the legislature as the party to sue and be sued. Sup-

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(a) 1 B. & Ald. 312.

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pose, for instance, that a contract were entered into by the surveyor, under the direction of the Justices at Quarter Sessions, there the surveyor would be acting for the inhabitants of the county, and might be sued for a breach of that contract. The remedy here may be by indictment, but the statute does not give this additional remedy against the inhabitants of the county. Lord *Kenyon*, C. J., in *Russell v. The Men of Devon*, observed, that it would be a great hardship to those persons who became inhabitants of the county after the injury sustained and before judgment, to be compelled to contribute their proportion. [*Parke*, B.—Would not that observation be equally applicable to the case of a proceeding by indictment?] In *Harris v. Baker*, the trustees of a public road were required by Act of Parliament to place lamps along the road, and, from the want of such lights, the plaintiff's wife fell in the road and was injured; and it was held that the action was not maintainable against the trustees. Lord *Ellenborough*, C. J., said, "If, by omitting to put up lamps where it is necessary, they are guilty of a breach of public duty, they may be indicted for it. But to hold that every trustee of a road is liable in damages for such an accident as this, would, I conceive, be going further than any case warrants." The 54 Geo. 3, c. 90, was passed for the purpose of amending the 43 Geo. 3, c. 59, but it does not throw much additional light upon this question.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—This was an action against the defendant, as surveyor of a county bridge, for a particular damage sustained by the plaintiffs in consequence of a want of repair of a county bridge. The pleas were, first, not guilty; and secondly, that a reasonable time for the repair of the bridge had not elapsed before the alleged in-

jury.—A verdict passed for the plaintiffs, and this was a motion in arrest of judgment.

The only question is, whether an action for a personal and peculiar damage, resulting to the plaintiffs from the want of proper repair to a county bridge, will lie against the county surveyor.

There is no doubt of the truth of the general rule, that, where an indictment can be maintained against an individual or a corporation, for something done to the general damage of the public, an action on the case can be maintained for a special damage thereby done to an individual, as in the ordinary case of a nuisance in the highway by a stranger digging a trench across it, or by the default of the person bound to repair *ratione tenuræ*. Upon this ground the Corporation of Lyme Regis were held to be bound to compensate an individual for the loss sustained by non-repair of sea-walls, in a case which was decided by the Court of Common Pleas, 5 Bing. 91,—the Court of King's Bench, 3 B. & Ad. 77, 93, in error,—and finally by the House of Lords, 8 Bligh, 690 (a). But it has been held that no such action on the case would lie against the inhabitants of a county for a special injury sustained by a plaintiff by reason of their neglect to repair a county bridge: *Russell v. The Men of Devon* (b). We think it clear, on the full consideration of that case, that the only reason why the action would not lie was, because the inhabitants of the county were not a corporation, and could not be sued—a difficulty which was got rid of in the case of the statutes of Hue and Cry, by giving a specific remedy against the hundred.

We have, then, to decide, whether the 4th section of the 43 Geo. 3, c. 59, removes that difficulty, and gives a remedy to the injured party against the county by suing the surveyor. The section provides (his Lordship read

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the section). After much doubt and deliberation, we think that this section does not enable the plaintiffs specially injured to sue the county.

The occasion on which the Act of Parliament was passed, was the doubt which had arisen shortly before in the House of Lords, in the case of *The Inhabitants of Cumberland v. Rex* (a), April, 1803, whether the inhabitants of a county were bound, not only to repair, but also to widen a county bridge; and one of the objects of the Act was to settle that question.

The 2nd section gives power to the quarter sessions to widen bridges, and authorises the surveyor to contract for land for that purpose, as the surveyor of the highways is authorised by the 13 Geo. 3, c. 78. This, however, was not the only object. The 1st section gives to the county surveyor the same power as a parish surveyor of high-roads had to get materials and the like.

The 3rd section gives the property in all materials and tools purchased by order of the justices, or belonging to the county, to the county surveyor of bridges, in whom the property may be laid in actions or indictments.

The clause in question, giving the power of indicting and being indicted, suing and being sued, follows the 3rd; and the sole question is, what is the true meaning of that part of the clause, which enacts that counties may be sued in the name of the surveyor. The first part gives a remedy by action to the county, where it had none before, for the injury to bridges, and that in the name of the surveyor: it follows up and gives effect to the preceding section, by giving a right of action to the counties in the same name for the damage done to the property given to them by the 3rd section, as well as any other property they might have by law.

What is the meaning of the second part, which directs that

(a) 3 Bos. & P. 354.

counties may be sued in the same name? Had the intention of the legislature been to constitute a new liability in counties to actions, to which they were not liable by common law, and so to provide a remedy for individuals who suffer by their default, the obvious course would have been to recite the grievance, and provide for the remedy in express terms. Nothing equivalent to this is done, and there is nothing to lead one to believe that this supposed defect of justice was in their contemplation at all. On the contrary, it is probable that, if it had been, the legislature would not have confined the remedy to complaints against counties, but would have extended it to complaints against hundreds, or other districts liable to the repair of bridges, or to parishes or other places liable to the repair of roads, with respect to whose defaults individuals may have just the same ground of complaint, and more frequent occasion to complain. It may safely therefore be laid down that the present case was not in the contemplation of the legislature. But it may be said, nevertheless, that those words ought to be construed, according to the established rules of construction, to have that effect; for words are not to be treated as inoperative, if by reasonable intendment they can be made operative; and, as there was no case in which, independently of this clause, an action would lie against the county for any cause whatever at common law, or under the other clauses of the Act, the words ought to be construed to give a right of action, to be exercised by suits against the surveyor in all cases in which the county had been guilty of a default, for a special and peculiar injury. But it is to be observed that, under the Act, the surveyor is not to be indemnified against the *damages* he has been made liable to pay, but only as to his *costs* and *charges*; and it is not likely that the legislature meant him to be obliged to pay more than he could be reimbursed by the county fund. It may therefore reasonably be considered, that the legislature supposed there was some case where the county was liable at common law, and might

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have execution against it for the *damages*, though in truth there is none; or that the surveyor might be suable on behalf of the county, upon a contract for the purchase of land under the 2nd section, as he would have to sue upon it, and have costs to pay; whilst the sum or damages to be recovered from him would have to be levied by two justices under the powers of the 13 Geo. 3, c. 78, incorporated into this Act by reference by the 2nd section of the Act 43 Geo. 3. This view of the case will make the provisions of the Act consistent. And, upon the whole, in the absence of any proof from the Act itself that the case was in the contemplation of the legislature, and with a strong inference to the contrary, we think the more reasonable construction of the Act of Parliament is, that it does not extend to give a right of action in this case. We have, therefore, come to the conclusion that the judgment ought to be arrested.

Rule absolute.

Jan. 26.

HUBBERSTY and Another v. WARD.

The master of a vessel has no power to charge his owner by signing bills of lading for a greater quantity of goods than those on board.

TROVER for 145 quarters of wheat.

Pleas.—First, not guilty; secondly, that the wheat was not the property of the plaintiffs.

At the trial, before *Wightman*, J., at the Liverpool Summer Assizes, 1852, the following facts appeared:—The plaintiffs were merchants at Hull, and the defendant was the owner of a sloop called the “*Celerity*,” of which one *Simpkin* was master. In the beginning of April, 1852, one *Potterill*, having undertaken to load the “*Celerity*” with wheat, to be exported to Antwerp, put on board a portion thereof, consisting of 229½ quarters. *Hans, Marcher, & Co.*, of Hull, having made advances to *Potterill* upon this wheat, on the 3rd of April *Simpkin* signed a bill of lading for the same as shipped by *Hans, Marcher,*

& Co., and deliverable at Antwerp to Messrs. Kemy Frères. On the 13th of April Potterill put on board 75 quarters more, upon which Simpkin signed a bill of lading making it deliverable at Antwerp to Potterill or order. On the following day, Potterill obtained advances from the plaintiffs upon the 75 quarters, and the bill of lading was indorsed by Potterill to them as a security. Between the 13th and 16th, a further quantity of 70 quarters was shipped by Potterill, and, according to the plaintiffs' evidence, a similar bill of lading was signed by Simpkin. On the 17th this bill of lading was also indorsed by Potterill to the plaintiffs, as a security for advances made on the 70 quarters. After this transaction took place, Hans, Marcher, & Co., to whom the 229½ quarters had been pledged, were applied to by Potterill for an advance upon the two parcels of 75 and 70 quarters. Hans, Marcher, & Co., in consequence, requested Simpkin to sign a bill of lading for 145 quarters, which he at first refused to do, alleging that in such case he would be signing for more wheat than he had on board. On the following day, however, at the request of Potterill, and upon his pretending to destroy the bill of lading for 75 quarters, Simpkin signed a bill of lading for 145 quarters, as shipped by Hans, Marcher, & Co., deliverable at Antwerp to Kemy Frères, which bill of lading was delivered to Hans, Marcher, & Co., who made advances upon it. Simpkin stated at the trial that he did not sign the bill of lading for 70 quarters; and it was suggested on the part of the defendant that the signature to that bill of lading was forged by Potterill, who had absconded. On the 28th of April, the cargo arrived at Antwerp, and was delivered to Messrs. Kemy Frères, under the bills of lading for 229½ and 145 quarters. The plaintiffs afterwards sent to Antwerp, and demanded possession of the 145 quarters under the two bills of lading for 75 and 70 quarters, but were informed by the master that he had already delivered them to Messrs.

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Kemy Frères. The learned Judge left it to the jury to say whether the bills of lading for 75 and 70 quarters were genuine or forged documents; and the jury being of opinion that they were both genuine, his Lordship directed a verdict for the plaintiffs.

Watson, in the following Term, obtained a rule nisi for a new trial, on the ground of misdirection; against which

Unthank shewed cause (Jan. 13).—First, it is conceded that the master of a ship who signs bills of lading for goods which have never been shipped, is not the agent of the owner, so as to render him responsible to persons who make advances upon the faith of the bills of lading so signed: *Grant v. Norway* (a). But it is submitted that the master is the agent of the owner to give bills of lading for goods on board. Here the master acted carelessly in signing a second bill of lading for the same goods, but the owner is nevertheless bound by his act. If a master improperly stows away goods so that they are damaged, no doubt the owner is liable. In like manner, the duty of the master is to take due and proper care in signing bills of lading, and if he acts negligently and exceeds his authority, the owner is responsible. [*Pollock*, C. B.—If the master cannot sign bills of lading for goods not on board, it follows that he cannot sign for a greater quantity than are on board. When once he has signed to the extent of the goods on board, his authority quoad those goods is gone.] The master ought to have ascertained whether the bills of lading for 75 and 70 quarters had in fact been destroyed, before he signed that for 145 quarters; but the act done was within the scope of his authority, though negligently executed. In *Howard v. Tucker* (b), goods being shipped

(a) 10 C. B. 665.

(b) 1 B. & Ad. 712.

in India for London, on account of a person there, the bill of lading was forwarded to him, and he indorsed it over for value. The bill of lading signed by the captain stated the freight to have been paid in Bengal; but it was found, after the above transfer had taken place, that through default of the shipper freight had never been paid; and it was held that the shipowners who detained the goods could not claim payment of the freight from the assignees of the bill of lading. [*Pollock*, C. B.—That case proceeded on this principle, that the captain was authorised to receive the freight; and if he chose to sign such a bill of lading without being paid, that was a matter between him and his employer; but that third persons, who took the bill of lading upon the faith of his incorrect statement, ought not to suffer loss by it.]—Secondly, the title of the plaintiffs was complete before the master signed the bill of lading for 145 quarters. The indorsement to the plaintiff of the bills of lading for 75 and 70 quarters was equivalent to a delivery of the wheat to them; and from that time the defendant must be considered as having held it as their agent: *Hawes v. Watson* (a), *Gillett v. Hill* (b). The plaintiffs could not maintain an action on the case for the non-delivery: *Howard v. Shepherd* (c).

T. Jones, in support of the rule.—The bill of lading for 145 quarters was obtained from the master by the fraud of Potterill, under whom the plaintiffs claim. *Bates v. Todd* (d) shews that a bill of lading is not conclusive between the shippers of the goods and the owners of the ship, but that the owners might shew that less goods than those specified in the bill of lading were shipped, the master, who signed the bill of lading, having been misled by the fraud of the agent of the shippers. In *Caldwell v. Ball* (e)

(a) 2 B. & C. 540.

(d) 1 Moo. & Rob. 106.

(b) 2 C. & M. 530.

(e) 1 T. R. 205.

(c) 9 C. B. 297.

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it was held that, where several bills of lading have been signed of different imports, no reference is to be had to the time when they were signed by the captain, but the person who first gets one of them by a legal title from the owner or shipper has a right to the consignment. *Grant v. Norway* (a) is an authority against the proposition that the owner is bound, when the master signs bills of lading for a greater quantity of goods than are shipped.

Cur. adv. vult.

POLLOCK, C. B., now said—In this case we are of opinion that the rule ought to be discharged. We think that, when a captain has signed bills of lading for a cargo that is actually on board his vessel, his power is exhausted; he has no right or power, by signing other bills of lading for goods that are not on board, to charge his owner. On the present occasion, it appears that the action was brought in respect of bills of lading which had clearly a priority of claim; and we think the verdict was right, and that the rule for a new trial ought to be discharged.

Rule discharged.

(a) 10 C. B. 665.

1853.

WATSON v. WAUD.

Jan. 14.

TROVER for goods and chattels: there was also a count for an excessive distress.—Plea, not guilty (by statute).

At the trial, before Lord *Campbell*, C. J., at the last Yorkshire Summer Assizes, the following facts appeared:—The defendant advertised to be let a public house, some cottages, and five acres of grass land, all of which one Walmsley occupied as tenant from year to year, under a tenancy expiring on the 13th of May, 1851, the cottages being occupied by his under-tenants. These tenements had previously been occupied by one Clayton. Walmsley gave notice to quit on that day to all the under-tenants, except a Mrs. Richardson. On the 14th of May, 1851, the defendant agreed with the plaintiff to demise to him all the premises occupied by Clayton (including Mrs. Richardson's cottage) from the following day, at the yearly rent of 145*l.*, payable on the 14th of November and 14th of May, until a six months' notice to quit, expiring at any time of the year, should be given. Mrs. Richardson continued in possession of the cottage let to her at 5*l.* a year, and possession could not be given to the plaintiff pursuant to the defendant's agreement to let; and the plaintiff's endeavours to get her out were ineffectual. The plaintiff, however, entered and enjoyed all the rest of the property; and in October, 1851, before the first half year's rent became due, the plaintiff and defendant met together, when the plaintiff complained that he could not get Mrs. Richardson out of the cottage, and desired the defendant to bring an ejectment against Walmsley, the prior tenant to himself; which the defendant declined, alleging that he had given possession of all

The defendant, by agreement, demised to the plaintiff certain premises from the 15th of May, 1851, at the yearly rent of 145*l.*, payable on Nov. 14th and May 14th. These premises had been let to W., whose tenancy expired on the 15th of May, 1851, and who had omitted to give a notice to quit to one of his under-tenants, who occupied a cottage at a yearly rent of 5*l.*; and, in consequence, the plaintiff could not obtain possession of that part of the premises. It was then agreed that the defendant should receive from the under-tenant rent for two half years, and deduct that 5*l.* from the rent to be paid for the whole by the plaintiff, and that the plaintiff should pay 70*l.* to the defendant on the 14th of Nov. 1851, and 14th of May, 1852:—*Held*, that such agreement operated as a due on the 14th

new demise; and that the defendant was entitled to distrain for 70*l.*, which became due on the 14th of November.

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he had let to the plaintiff. To settle this dispute, the defendant and the plaintiff agreed that the defendant was to receive from Mrs. Richardson rent for two half-years, and deduct that 5*l.* from the rent to be paid for the whole by the plaintiff; and that the plaintiff was to pay 70*l.* to the defendant on the 14th of November, 1851, and on the 14th of May, 1852.

It was objected, on behalf of the plaintiff, that, according to the authority of *Neale v. Mackenzie* (a), the defendant had no right to distrain. On the part of the defendant, it was submitted, that the agreement for the two half years operated as a good demise of all the premises except Mrs. Richardson's. The learned Judge was of opinion that there was no such new demise, but that the agreement for the two half years was only an arrangement as to the mode of payment of the original rent during that period, Mrs. Richardson's cottage being still considered part of the demised premises; and his Lordship directed a verdict for the plaintiff, reserving leave to the defendant to move to enter a verdict for him, if the Court should be of opinion that such agreement gave a right to distrain.

A rule nisi having been obtained accordingly,

Rew (Watson with him) shewed cause in last Michaelmas Term (Nov. 22).—The distress was unlawful. The agreement of the 14th of May, 1851, was for the demise of the whole of the tenements, at one entire rent of 145*l.* But, when that agreement was entered into, Mrs. Richardson was in lawful possession of her cottage as tenant to the defendant; therefore, as to that part of the premises, the demise was void, for the defendant was unable to confer any interest in it. Since the plaintiff never had possession of that part, no rent whatever was due, for he never had the consideration for the entire rent, and no ascertained sum was re-

(a) 1 M. & W. 747.

served for the residue of the premises. The case falls precisely within the authority of *Neale v. Mackenzie* (a). It is said, however, that the agreement for the two half-years operated as a new demise. But that was merely an arrangement as to the mode in which the rent previously reserved was to be paid. The object of the parties was not to apportion the rent or create a new tenancy, but to carry into effect the original agreement. *Crowley v. Vitty* (b) shews, that a mere parol agreement by a landlord to accept a reduced rent will not operate as a new demise. Here there was a valid agreement in respect of the entire premises, and upon which a right of action accrued to the plaintiff, and that could not be avoided by a subsequent parol agreement: *Goss v. Lord Nugent* (c). Besides, the parol agreement is void within the 4th section of the Statute of Frauds (29 Car. 2, c. 3), since it is an agreement for a future interest in land: *Inman v. Stamp* (d), *Edge v. Stratford* (e).

Hugh Hill and *Joyce*, in support of the rule (November 22 and 23).—First, admitting that, by the defendant's default the plaintiff did not obtain possession of that part of the premises which was in the occupation of Mrs. Richardson, still there was a valid demise from year to year of the remainder of the tenements, at an uncertain rent, which was subsequently ascertained and fixed by the agreement entered into between the plaintiff and defendant in October, 1851. The defendant was therefore entitled to distrain for this amount of rent. It is clear that, where there is a valid demise of premises consisting of several tenements and the rent is not apportioned, and the tenant has entered upon the occupation of a part only of the premises, the parties may afterwards,

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(a) 1 M. & W. 747.

(b) 7 Exch. 319.

(c) 5 B. & Ad. 58.

(d) 1 Stark. N. P. 12.

(e) 1 C. & J. 391.

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by parol, fix the amount of rent to be paid for that portion of the premises which the tenant has occupied, and the landlord may distrain for the amount so fixed. The case falls within the principle of that class of cases, where, a tenant having entered under an agreement not stating the amount of rent, and having afterwards paid a certain yearly rent, it has been held that the landlord is entitled to distrain: *Cox v. Bent* (a), *Knight v. Bennett* (b). In *Neale v. Mackenzie* (c), which is relied upon by the plaintiff, there was no new agreement by the parties to apportion the rent, and therefore it was held that, as the tenant had not enjoyed the whole thing demised, the landlord could not distrain. Secondly, assuming the original demise to be altogether void, still, the tenant being in the occupation of the premises, and he and the defendant having agreed that he should continue in that occupation upon the payment of a certain rent, the defendant was entitled to distrain for that rent upon its becoming due and being unpaid.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B., (after stating the facts as above set forth, his Lordship proceeded)—Upon these facts, an objection was taken on the part of the plaintiff to the defendant's right to distrain, on the authority of *Neale v. Mackenzie* (c). It was said that, inasmuch as the rent of 145*l.* was reserved for the whole of the tenements, and the demise as to Mrs. Richardson's cottage being void, either because the defendant had on the 14th of May, 1851, no title to demise it, or, if he had, the defendant not having given possession of it, the whole rent had not become due, for the plaintiff never had the consideration for the whole rent; and the rent of the residue not having been fixed at a cer-

(a) 5 Bing. 185.

(b) 3 Bing. 361.

(c) 1 M. & W. 747.

tain sum, there was no right to distrain; and Lord *Campbell* was of that opinion. He thought that what occurred in October, 1851, was not a new demise of the tenements minus Mrs. Richardson's, but only an arrangement how the rent under the old agreement should be paid, Mrs. Richardson's cottage still being considered part of the demised premises.

On the other hand, the defendant contended, that it operated as a new demise, for it fixed the payment of rent, which under the old agreement was uncertain, and the day for payment, and gave a right to distrain for it. Lord *Campbell* reserved this point; and, after much consideration, we think that the latter view is correct; and that what passed did operate as a demise, and that the defendant had a right to distrain for 70*l.* on the 14th of November.

It is quite clear that, if no new agreement had been come to, the case of *Neale v. Mackenzie* would have applied, and the defendant could not have distrained; because the plaintiff, not having had all he bargained for, for which he was to pay his rent of 145*l.*, was not bound to pay it; and the law would not apportion the rent, and make him liable to pay a part proportioned to the part enjoyed, as it does in the case of eviction by title paramount. But here the parties came to a fresh agreement, and the question is, what is the legal effect of that agreement. It appears that there was a dispute between the plaintiff and the defendant as to what the actual bargain was, the defendant insisting that Mrs. Richardson's cottage was not included in it, the plaintiff that it was. It was ultimately agreed that it was; and the effect of that was, that the plaintiff had not had what he bargained for, and so was not bound to pay 145*l.* a year, but only so much as the residue which he had enjoyed was reasonably worth. It was then agreed that the plaintiff should pay for that part 140*l.* a year—70*l.* payable on the 14th of November, 1851, and 70*l.* payable on the 14th of May, 1852. This

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amounts to a demise for that period for a certain rent; for no particular words are necessary to constitute a demise. Here is an agreement, on the one hand to permit to continue to occupy for a certain rent payable on a certain day, and on the other to occupy, and this constitutes a demise; and this leaves the original bargain unaffected, with respect to the time after the first year. The original agreement did not operate as an actual lease, for the tenant had not what he bargained for; and then the parties came to a new agreement, which in effect was to demise part till May, 1852, at 140*l.* a year, and afterwards the whole at 145*l.* There are several cases analogous to this, of occupation under an agreement for a lease, where there was no power to distrain till a certain rent was paid or settled on account, after which the landlord has been held to have the right to distrain: *Cox v. Bent* (a), *Knight v. Bennett* (b), and *Regnart v. Porter* (c), where *Tindal*, C. J., says, it may be conceded, that, if a party enters (under an agreement for a lease) and pays or promises to pay a rent certain, or settles it in account, a new agreement may be presumed, under which the landlord may have a right to distrain. Here a new agreement was actually made.

Rule absolute.

(a) 5 Bing. 185.

(b) 3 Bing. 361.

(c) 7 Bing. 451.

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SCOTHORN and Another v. THE SOUTH STAFFORDSHIRE
RAILWAY COMPANY.

Jan. 22.

ASSUMPSIT.—The declaration stated, that the plaintiffs, on &c., delivered to the defendants certain goods and chattels of the plaintiffs, to be safely and carefully carried and conveyed from a certain railway station of the defendants, called “The Great Bridge Station,” to London, and then paid the defendants a certain sum of money, their hire and reward in that behalf; and the defendants then promised the plaintiffs to deliver the said goods and chattels according to the direction of the plaintiffs in that behalf.—Breach, that, although the plaintiffs afterwards directed the defendants to deliver the said goods and chattels at a certain place in London, called “The Bell Wharf, Ratcliffe, London,” and although the defendants, by the servants of the London and North Western Railway Company, their lawful agents in that behalf, promised to deliver the goods according to the direction of the plaintiffs, yet they neglected so to do, and, contrary to the directions of the plaintiffs, transmitted the same to a certain place called “Melbourne,” in the colony of Australia; in consequence whereof the plaintiffs lost and were deprived of the said goods and chattels, and were unable, from the loss thereof, to proceed on their voyage as emigrants, which they intended to do and otherwise would have done, and were hindered and prevented from earning their livelihood in the way of their business, and were kept and detained in London without employment &c.

Pleas:—First, that the goods were not delivered to the defendants to be carried from “The Great Bridge Station” to London Secondly, that the defendants did not promise the plaintiffs to deliver the goods according to the directions of the plaintiffs. Thirdly, that the plaintiffs did not direct the defendants to deliver the goods at “The

The plaintiff delivered at a station of the South Staffordshire Railway Company certain goods, addressed “to the East India Docks, London,” and paid one sum for their carriage the whole distance. By the practice of the South Staffordshire Railway all goods delivered at that station for London are forwarded on their own line to Birmingham, and from thence by the London and North Western Railway. Before the goods in question arrived in London, the plaintiff directed a clerk at the London station of the latter Company to forward them to another place, which the clerk promised to do. The goods were however delivered according to the original address, and thereby lost:—*Held*, that the South Staffordshire Railway Company were responsible for the loss.

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Bell Wharf, Ratcliffe, London." Fourthly, that the defendants did not, by the servants of the London and North Western Railway Company, promise to deliver the goods according to the directions of the plaintiffs. Fifthly, that the defendants did not neglect to deliver the goods according to the directions of the plaintiffs; nor did the defendants, contrary to the said directions, transmit the goods to Melbourne. Sixthly, that the London and North Western Railway Company were not the agents of the defendants.—Upon which issues were joined.

At the trial, before *Martin*, B., at the Middlesex Sittings in last Michaelmas Term, the following facts appeared:—The plaintiffs, who resided in Staffordshire, being about to emigrate to Australia, sent to the Great Bridge Station of the South Staffordshire Railway Company certain packages, to be forwarded by that Company to London. These packages were labelled "Scothorn & Co., to the East India Docks, passenger-ship Melbourne, Australia." A sum was paid to the clerk at the station for the carriage of the goods the entire distance to the East India Docks. By the practice of the South Staffordshire Railway Company, all goods received at the Great Bridge Station and directed to London are carried on their own line as far as Birmingham, and from thence forwarded to their destination by the London and North Western Railway Company. While the goods in question were in transit, one of the plaintiffs arrived in London, and, finding that no berths could be had on board the Melbourne, went to the Euston Square Station of the London and North Western Railway Company, and left with a clerk in the office a receipt which had been given for the goods, having previously written across it "Send the boxes, &c., to Scotthorn & Co., Engineers, Bell Wharf, Ratcliffe, London." The clerk said that the goods should be safely delivered according to this address on the following day, and that there was no additional charge. The goods, however, on their arrival in London, were sent to the Melbourne

and carried to Australia, where they were lost. It was submitted, on behalf of the defendants, that they were not responsible, inasmuch as their contract was to deliver the goods on board the Melbourne, which had been performed; and that they were not bound by what took place between the plaintiffs and the London and North Western Railway Company. The learned Judge left it to the jury to say whether the clerk at the Euston Square Station had authority from the defendants to receive the countermand; and, the jury being of that opinion, his Lordship directed a verdict for the plaintiffs, reserving leave for the defendants to move to enter a nonsuit.

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Bramwell, in the same Term, obtained a rule nisi accordingly; against which,

James and *Hawkins* now shewed cause.—The cases of *Muschamp v. The Lancaster Railway Company* (a) and *Watson v. The Ambergate Railway Company* (b) establish this principle, that, where a Railway Company undertakes for reward to carry goods from one point to another, they are responsible for loss by negligence between the termini, notwithstanding the line of railway on which the loss occurred belonged to another Company. The ground of those decisions is that, the Company having contracted to carry the goods the entire distance, the parties to whom they deliver them over become their agents for that purpose. It is evident, therefore, in this case, that the London and North Western Railway Company were the agents of the defendants for the purpose of carrying the goods to their destination, and delivering them according to their original address; then, if so, they were also their agents to receive a countermand. It is the same as if the countermand had been given to one of the defendants' servants in

(a) 8 M. & W. 421.

(b) 15 Jur. 448.

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London; and, that not having been obeyed, the defendants are liable for the loss.

Gray in support of the rule.—It is conceded that the defendants would have been responsible, if the loss had happened on the line of the London and North Western Railway Company; but that is not the complaint here. This declaration is framed on a new contract to deliver at “The Bell Wharf, Ratcliffe;” but the clerk at the Euston Square Station had no authority to bind the defendants by such a contract. All that the defendants contracted to do was, to deliver the goods on board the *Melbourne* in the East India Docks; and that they have done. [*Alderson*, B. —The contract was to deliver the goods according to the plaintiffs’ directions. A person who puts an address on a parcel does not necessarily make a contract to deliver at that place; he only gives a direction, which he may afterwards countermand.] Assuming that to be so, the clerk at the Euston Square Station was not the defendants’ agent to receive the countermand.

ALDERSON, B.—The rule ought to be discharged. There can be no doubt that the defendants made a contract to carry the plaintiffs’ goods the whole distance to London, for certain reward for the entire journey; and there is also no doubt that they would have been liable for loss through their negligence in carrying during any part of that journey. Then, the question arises, what was the contract between the parties? It really amounts to no more than a question of fact; and there is abundant evidence of a contract to deliver, as stated in the declaration, according to the plaintiffs’ directions, in London. It is true that originally, when the goods were placed in the defendants’ possession, the direction given by the plaintiffs was to put them on board the *Melbourne*, at the East India Docks; but the plaintiffs, having altered their inten-

tion, communicated it to the defendants' agent, who was authorised to deliver the goods according to the original contract, and desired him not to send them according to the direction upon the packages, but elsewhere. By some negligence that order was disobeyed, and the goods are lost. Then it is said that the defendants have performed their contract; but that is not so. Their contract was to procure their agent to deliver according to the plaintiffs' directions; that they have not done, and have in consequence occasioned a loss, which they are bound to make good.

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PLATT, B.—The reception of the countermand is parcel of the contract itself. The declaration states that the defendants received the goods, to be delivered according to the plaintiffs' direction. That imports that the plaintiffs were to have a control over them, and might stop them at any part of the journey. Though the direction originally was to deliver them at the East India Docks, yet, that being countermanded, the defendants had no right to take them there. If a carrier undertakes to carry goods from one place to another, it is subject to a countermand at any part of the journey, though the owner may be bound to pay for the whole distance; for the carrier has no right to carry them against the will of the owner. It was incidental to the office of clerk at the Euston Square Station, to do all that the defendants themselves would have been bound to do. He was their agent to receive the countermand; and my Brother *Martin* was perfectly right in his ruling.

MARTIN, B.—I entirely concur. If the transaction be looked at, the matter is transparent. The plaintiffs send a parcel of goods to the defendants' station, with a direction that the goods shall be delivered on board a ship in the East India Docks. It is said that that is a contract.

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In one sense it is not. It is the case of a person taking goods, to be disposed of according to the directions of another; and could it be contended that, if the latter went an hour afterwards and said "I have altered my mind, give me back my goods," the former would have a right to reply, "No, you have entered into a contract with me to place them on board a ship, and they shall go?" A carrier is employed as bailee of a person's goods for the purpose of obeying his directions respecting them, and the owner is entitled to receive them back at any period of the journey when they can be got at. To say that a carrier is only bound to deliver goods according to the owner's first directions, is a proposition wholly unsupported either by law or common sense. I can well understand the case of goods being placed in such a position that they cannot easily be got at, though it is usually otherwise. But suppose a traveller by railway did not wish to proceed on his journey, and left the carriage and asked for his luggage, which he would clearly have a right to do, if Mr. *Gray's* argument is correct, the Company might say, "No, we have contracted to carry it to the end of the journey, and we will take it on." It is clear, therefore, that the contract with a carrier is to deliver the goods according to the directions of the owner. But then it is said, assuming that to be so, here the defendants carried the goods only a part of the way, and the London and North Western Railway Company the other part; but in my opinion that makes no difference. If the defendants choose to employ the London and North Western Railway Company, they make the latter their agents to carry, and consequently to receive a countermand. I do not say that they are agents to convey goods to a further destination, as for instance, if the London and North Western Railway Company had agreed to carry these goods on to an entirely different place, that would not have been binding on the defendants. But I am clearly of opinion, that the plaintiffs

were entitled to require their goods to be delivered at a place other than the original address, and that the clerk had authority to assent to it. Applying common sense to the subject, he was the clerk of the defendants for the purpose of executing the orders of the owners of goods which the defendants contracted to carry.

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Rule discharged (a).

(a) *Pollock*, C. B., was absent.

FORSYTH v. BRISTOWE.

Jan. 25.

QUAIN had obtained a rule calling on the plaintiff to shew cause why the replication in this case should not be amended under the 15 & 16 Vict. c. 76, ss. 51, 52(b), the same being so framed as to embarrass the fair trial of the action.

The declaration contained two counts in covenant for principal and interest on mortgage deeds, and two counts on bonds conditioned for payment of the same principal and interest. To the first count the defendant pleaded, "that the cause of action mentioned in that count did

To a declaration on a specialty, the defendant pleaded the Statute of Limitations, 3 & 4 Will. 4, c. 42, s. 3, to which the plaintiff replied, "that the defendant, before the commencement of the suit, made an acknowledgment that the debt remained unpaid and due

to the plaintiff within the true intent and meaning of the statute; and that the action was brought within twenty years after such acknowledgment:—*Held*, that the replication was a pleading so framed as to prejudice the fair trial of the cause, within the 15 & 16 Vict. c. 76, s. 52, and ought to be amended by specifying the mode of acknowledgment relied on.

(b) Sect. 51. "No pleading shall be deemed insufficient for any defect which could heretofore only be objected to by special demurrer."

Sect. 52. "If any pleading be so framed as to prejudice, embarrass, or delay the fair trial of the action, the opposite party

may apply to the Court or a Judge to strike out or amend such pleading; and the Court or any Judge shall make such order respecting the same, and also respecting the costs of the application, as such Court or Judge shall see fit."

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not accrue within twenty years before this suit." To that the plaintiff replied, "that the defendant, before the commencement of this suit, made an acknowledgment that the debt in the first count mentioned remained unpaid and due to the plaintiff, within the true intent and meaning of the statute in that behalf made and provided; and that this action was brought within twenty years after such acknowledgment was so made as aforesaid." To the other counts there were similar pleas and replications. The application was supported by an affidavit of the defendant, which stated that many years ago he sold the equity of redemption in the mortgaged premises, and had not since then had any connection or dealing with them; that he had not, to the best of his knowledge and belief, made any acknowledgment of any debt due to the plaintiff by himself or his agent within twenty years before the commencement of this suit, or paid to the plaintiff on his own behalf any portion of the principal sum or interest within that period; that he was wholly ignorant to what acknowledgments the replications in the present action referred; that he was advised and believed that, unless the replications were amended, and made more explicit and certain, he could not be prepared with any evidence to rebut such acknowledgments, and would therefore probably be taken by surprise at the trial of the cause, and would be unfairly embarrassed in the conduct of his case.—A similar application had been made to *Martin, B.*, at Chambers, who refused to make any order.

Milward shewed cause.—The replications are in the form authorised by the 5th section of the 3 & 4 Will. 4, c. 42 (a). That section does not require the replication to

(a) Sect. 5. "Provided always, that if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such indenture, specialty, or recognisance, or his agent, or by part payment or part satisfaction on

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specify the particular mode of acknowledgment, but only to state generally, that there was an acknowledgment within the prescribed period. [*Alderson*, B.—Before the 15 & 16 Vict. c. 76, such a form of replication would have been clearly bad on special demurrer. *Parke*, B.—The 3 & 4 Will. 4, c. 42, s. 5, after mentioning three kinds of acknowledgment, says, that the plaintiff “may, by way of replication, state *such* acknowledgment,” that is, an acknowledgment either by writing, or by part payment or part satisfaction. There may be great expense in investigating part payment, and very little in proving an acknowledgment in writing; but the effect of this form of replication would be to cast upon the defendant the costs of that part on which he succeeded.] The real question is, whether this replication is calculated to embarrass, within the true meaning of the 15 & 16 Vict. c. 76, s. 52. [*Alderson*, B.—It is a pleading so framed as to prejudice the fair trial of the action, because it embraces three points, and compels the opposite party to come prepared to meet them all.] The prejudice contemplated by the statute is a prejudice to the fair result of the cause. [*Alderson*, B.—This replication has that effect. The fair result of the trial

account of any principal or interest being then due thereon, it shall and may be lawful for the person or persons entitled to such actions, to bring his or their action for the money remaining unpaid and so acknowledged to be due within twenty years after such acknowledgment by writing or part payment or part satisfaction as aforesaid; or, in case the person or persons entitled to such action shall, at the time of such acknowledgment, be under such disability as aforesaid, or the party making such

acknowledgment be, at the time of making the same, beyond the seas, then within twenty years after such disability shall have ceased as aforesaid, or the party shall have returned from beyond seas, as the case may be; and the plaintiff or plaintiffs in any such action, on any indenture, specialty, or recognisance, may, by way of replication, state such acknowledgment, and that such action was brought within the time aforesaid, in answer to a plea of this statute.”

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would be, that a party who relies on three answers and fails on one or two, should pay the costs of those on which he fails. The case of *Anderson v. Chapman* (a) shews, that under this form of pleading there can be no apportionment of costs.] The 222nd section of the 15 & 16 Vict. c. 76, empowers the Judge at Nisi Prius to make such amendments as may be necessary for the purpose of determining the real question in controversy between the parties. In actions on simple contract, where a replication to a plea under the 21 Jac. 1, c. 16, is merely a general denial, any number of part payments may be given in evidence, to take the case out of the statute. [*Parke, B.*—There part payment is only evidence of a promise.] In *Amott v. Holden* (b), which was an action on an annuity bond, to which there was a plea of the Statute of Limitations 3 & 4 Will. 4, c. 42, s. 3, and a replication that the cause of action accrued within twenty years, evidence was allowed of several breaches of the condition. [*Parke, B.*—That was a different point: there the statute did not begin to run until the forfeiture of the bond; and the plaintiff had a right to elect whether he would rely upon the first or a subsequent forfeiture. But the 3 & 4 Will. 4, c. 42, provides three modes by which a specialty debt may be taken out of the operation of that statute; and it is a prejudice to a defendant to be compelled to come prepared to meet three different matters, when perhaps the plaintiff intends to rely on one only.]

PER CURIAM (c).—The rule must be absolute.

Quain, who appeared in support of the rule, requested that the plaintiff might be ordered to specify the dates of the acknowledgment on which he intended to rely; but the Court refused the application.

Rule absolute.

(a) 5 M. & W. 483.

(b) 22 L. J., Q. B., 14.

(c) *Pollock, C. B., Parke, B., Alderson, B., and Martin, B.*

1853.

Jan. 20.

BOODLE v. DAVIS.

COLE moved for a rule calling on the defendant to shew cause why a suggestion should not be entered on the roll, and execution issued on a judgment, pursuant to the 129th section of the Common Law Procedure Act, 15 & 16 Vict. c. 76. The judgment was signed on the 22nd of April, 1850, and the parties were alive.—It is clear that, before that Act came into operation, execution could not have issued in this case, without a scire facias; and the question is, whether the 128th section (a) applies, for, if not, it is necessary to proceed under the 129th. [*Alderson*, B.—Execution may issue at once. A party has no right to proceed under the 129th section, except where the case is not within the previous section. *Platt*, B.—Before the 15 & 16 Vict. c. 76, the time for issuing execution was limited to a year and a day; now it is six years. *Parks*, B.—I entertain no doubt that the 128th section applies to existing judgments.]

The 128th section of the Common Law Procedure Act, 15 & 16 Vict. c. 76, applies to judgments signed more than a year and a day, but less than six years, before that Act came into operation.

Rule refused.

(a) Sect. 128. "During the lives of the parties to a judgment, or those of them during whose lives execution may at present issue within a year and a day without a scire facias, and within six years from the recovery of the judgment, execution may issue without a revival of the judgment."

Sect. 129. "In cases where it shall become necessary to revive a judgment by reason either of lapse of time, or of a change, by death or otherwise, of the parties entitled or liable to execution, the party alleging himself to be entitled to execution may either sue out a writ of revivor in the

form hereinafter mentioned, or apply to the Court or a Judge for leave to enter a suggestion upon the roll, to the effect that it manifestly appears to the Court that such party is entitled to have execution of the judgment, and to issue execution thereupon; such leave to be granted by the Court or a Judge upon a rule to shew cause or a summons, to be served according to the present practice, or in such other manner as such Court or Judge may direct; and which rule or summons may be in the form contained in the Schedule (A) to this Act annexed, marked No. 7, or to the like effect."

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Jan. 27.

WAUGH v. MIDDLETON and Another.

The 224th section of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, which enacts, that "every deed or memorandum of arrangement *now* or hereafter entered into" between the trader and his creditors, and executed by six-sevenths in number and value of those creditors whose debts amount to 10*l.* and upwards, touching the trader's liabilities and his release therefrom, and the distribution, inspection, &c., and winding-up of his estate, shall be obligatory in all respects upon all the creditors who shall not have signed such deed, &c., as if they had duly signed it, does not operate upon such instruments as were entered into and completed before the passing of that statute. But the section does apply to such instruments as were entered into before, and were inchoate at the time of the passing of the Act, and have been completed since that time.

THIS was an action by the plaintiff, as public officer of the Darlington District Joint-Stock Banking Company, for money lent, money paid, &c.

Third plea.—That, before and at the time of the making of the deeds thereafter mentioned, the defendants were traders and partners in trade liable to the bankrupt laws, and were indebted to divers persons, including the said Joint-stock Banking Company, in sums of money which they were unable to pay in full, and that they suspended payment. The plea then set out a deed of the 15th of April, 1847, whereby the defendants conveyed certain real property to trustees, in trust to sell the same for the benefit of the mortgagees of the defendants, and as to the residue, to stand possessed thereof to the same intents and purposes as in an indenture of the same date relating to the personal estates of the defendants. By this latter deed, which was also set out in the plea, the defendants assigned all their personal estate to trustees, in trust to pay their creditors rateably the sums set opposite their respective names. This deed contained a release to the defendants of all their debts. The plea then stated, that both deeds formed part of the same transaction; that the second deed comprised all the estate and effects to which the defendants had and were then entitled to; that they were deeds of arrangement between the defendants and their creditors, within the meaning of the Bankrupt Law Consolidation Act, 1849; and that the creditors who executed the said deed were more than six-sevenths in number and value of all the creditors of the defendants; that the said creditors who executed the said deed assented to the said

arrangement; that the Darlington District Joint-Stock Banking Company were, at the time of the making of the deeds, creditors of the defendants in respect of the causes of action in the declaration mentioned; that, after the suspension of payment by the defendants, and after the deeds had been so made, signed, and executed, the co-partnership had notice of the said suspension, and of the deeds, and of the arrangement, and then and ever since might have executed the said second deed; "that three calendar months from the time at which the co-partnership had notice as aforesaid of the said suspension of payment, and of the said deeds, and of the said arrangement, had elapsed before the commencement of this suit;" and that, by reason of the premises, and by force of the said statute, the said deeds became and were obligatory on the said co-partnership; and that the defendants were thereby released and discharged from the causes of action in the declaration mentioned.

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Demurrer, and joinder.

Cowling argued in support of the demurrer (Jan. 26).—The plea is bad. The deeds set forth in the plea were executed in 1847, and the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, was passed in 1849. The 4th section enacts, that the Act, "unless where otherwise specially provided, shall commence and take effect from and after the 11th day of October next." The plaintiff, though a creditor, was no party to these deeds. The rights of those creditors who were not parties to the deeds remained unaffected up to the 11th of October, 1849; and the question is, whether the 224th section (a) of the 12 & 13 Vict.

(a) That section enacts, "That every deed or memorandum of arrangement *now* or hereafter entered into between any such trader and his creditors, and signed by or on behalf of six-

sevenths in number and value of those creditors whose debts amount to 10*l.* and upwards, touching such trader's liabilities, and his release therefrom, and the distribution, inspection, con-

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c. 106, destroys such vested rights. The Act of Parliament ought to contain very strong and clear language, to take away a creditor's rights: *Tetley v. Taylor* (a), *Marsh v. Higgins* (b). It must be contended on the part of the defendants, that the word "now," which is to be found in the introductory part of that section, gives to the Act a retrospective effect, so as to make its provisions applicable to deeds of arrangement entered into and completed before the Act came into operation. The word "now" is certainly ambiguous, but cannot be read as "heretofore." Several of the clauses of the Act are arranged under different heads. One set of provisions, commencing with the 211th section and concluding with the 223rd, are prefaced by the following title "And with respect to arrangements between debtors and their creditors, under the superintendence and control of the Court, be it enacted." These are necessarily prospective. Then comes the 224th and other sections, under the head "With respect to arrangements by deed." Then follow the 230th and 231st sections, which are classed under this head "And with respect to composition after adjudication of bankruptcy," which are also prospective. The question, therefore, is, whether the word "now," contained in a section which is situated between other divisions of sections clearly pro-

duct, management, and mode of winding-up of his estate, or all or any of such matters, or any matters having reference thereto, shall (subject to the conditions hereinafter mentioned) be as effectual and obligatory in all respects upon all the creditors who shall not have signed such deed or memorandum of arrangement as if they had duly signed the same; and such deed or memorandum, when so signed, shall not be or be liable to be disturb-

ed or impeached by reason of any prior or subsequent act of bankruptcy: Provided always, that every creditor shall be accounted a creditor in value in respect of such amount only as, upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from such trader, shall appear to be the balance due to him."

(a) 1 E. & B. 521.

(b) 1 L. M. & P. 253.

spective in their operation, gives the effect to the statute for which the defendants contend. The 224th section may be read as applicable to such instruments as were inchoate at the time the Act came into force, and which were completed afterwards. In *Marsh v. Higgins* (a), it was held that the three months notice mentioned in the 225th section, means a notice given after the Act came into operation. The 226th, 227th, 228th, and 229th sections clearly provide for deeds executed after the passing of the Act. The 229th section authorises the Court of Bankruptcy to ascertain whether the trader's estate has been properly administered in conformity with the deed, and to make such an order with respect to the same as to the Court shall appear to be just. But it never could have been intended that the 224th section should apply to such creditors as could not be entitled to the benefit of the 229th and other sections, which provide for their interests.

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Manisty contra.—The Act is to be read so as to give effect to the language which the legislature have adopted. The fact that the language used in other sections is prospective, shews that, where retrospective words are used, it was intended that they should have a retrospective effect. The 224th section is a declaration that what should have been, shall for the future be the law. *Marsh v. Higgins* does not govern the present question. The decision there turned upon a different section of the Act. [*Al-derson, B.*—The words “now entered into” signify present time. And further, the deed must be signed by a certain number of creditors, whose debts *amount* to 10*l.* and upwards; according to the defendants’ argument, the word “amount” ought to be read as “*amounted*.” The creditors are entitled to a notice to enable them to exercise their

(a) 1 L. M. & P. 253.

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rights under the Act: where would be the necessity of such a notice, if the creditor could gain no benefit by it? All these matters taken together have a tendency to shew the meaning of the 224th section; and that it was not intended to apply to instruments complete at the time the Act came into operation.] It is submitted that the construction for which the defendants contend is the grammatical one, and the only one which gives full effect to every word in the 224th section.

The Court intimated that they would hear *Cowling* in reply, if they should consider any further argument upon the point necessary.

Cur. adv. vult.

POLLOCK, C. B., now said.—In this case it will be unnecessary to hear any further argument, as we are all of opinion that the plea is bad. The question turns upon the true construction of the 224th section of the 12 & 13 Vict. c. 106, under which a deed of arrangement, executed in 1847, and therefore two years before the passing of the Act in question, is pleaded in bar to the action. The 224th section is as follows: [His Lordship read it, and proceeded] It was contended on behalf of the defendants, that this clause was so completely retrospective in its operation, as to include any deed that had theretofore been executed and completed, even although the trader's property had been thereby entirely divided among a certain class of his creditors, and where those who had not signed the deed had lost all chance of receiving any share of the effects. The learned counsel for the defendants relied upon the grammatical construction of the Act, and contended, that the Court was bound to give effect to it according to that construction. That rule of construction has frequently been adverted to in this Court. But I doubt, if it were laid down as a general rule, that the grammatical construction of a clause shall prevail over its legal mean-

ing, whether a more certain rule would be arrived at, than if it were laid down that its legal meaning shall prevail over its grammatical construction. In my opinion grammatical and philological disputes, and indeed all that belongs to the history of language, is as obscure and leads to as many doubts and contentions as any question of law, and I do not, therefore, feel sure that the rule, much as it has been commended, is on all occasions a sure and certain guide. It must, however, be conceded, that where the grammatical construction is quite clear and manifest and without doubt, that construction ought to prevail, unless there be some strong and obvious reason to the contrary. But the rule adverted to is subject to this condition, that, however plain the apparent grammatical construction of a sentence may be, if it be perfectly clear from the contents of the same document (and the same rule applies in the construction not only of an Act of Parliament, but of deeds, wills, and of any subject of a like nature), that the apparent grammatical construction cannot be the true one, then that which upon the whole is the true meaning, shall prevail in spite of the grammatical construction of a particular part of it. There is no doubt that the word "now" imports "present time" or some reference to present time; and assuming the word to be used in its ordinary sense, according to the old regulations of Parliament and the old rules of the common law, it would have reference to the first day of the sittings; but according to the recent statute, it would refer to the 1st of August, 1849; and if the defendants' construction were adopted, the Act would have a retrospective effect, and would apply to a deed executed in 1847, since which time this power has been given to a certain proportion of the creditors, of releasing their debtor in spite of the opposition of a certain small portion of their number. The same rule also would apply to a deed executed ten, twenty, or fifty years ago.

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Now, although it may not be strictly correct to look at extraneous matters for the purpose of construing an Act, yet, upon looking to the history of legislation upon the subject of bankruptcy, it is difficult to believe, except under the strongest compulsion of language, that the legislature could have meant to enact a clause apparently so inconsistent with the general course of decisions. The defendants' counsel was justified in the observation, that the Court was seeking for some means of getting rid of the apparent effect of the word "now," or in other words, that the Court was so struck with what had the appearance of injustice and of absurdity in the view presented to them by him, that they were looking through the whole of the Act, to see whether they were absolutely compelled to adopt such a result as that for which he contended. We are of opinion, that we are not compelled to read the word "now," in the sense of "heretofore;" for, if the contention on the part of the defendants be correct, it must so be read. A very strong reason for holding that the legislature have not used the word "now" in that sense, is one which my Brother *Alderson* gave in the course of the argument, namely, that if the legislature intended so to use it, expressions might have been adopted which would have left no possible doubt on the mind of any one desirous of ascertaining what was intended. But there are no expressions that clearly and distinctly indicate the intention of giving effect to deeds that had theretofore been entered into and completed, so as to bind other persons not parties to them. And, in the absence of those expressions which might have been so easily used, grave doubts may be entertained, whether this could have been the meaning; and we are not bound to adopt that which appears to be repugnant to the general usage of Parliament, because an expression has been used, which, if it do mean this, certainly means it by the smallest amount of expression that can be used to

convey it. We are of opinion that the legislature contemplated, by the word "now," nothing more than this,—that whereas there may have been certain negotiations or arrangements commenced and entered into before the passing of this Act, such as are in that condition shall, although they may have been so far entered into that in equity they would be considered as complete engagements, and though in equity binding perhaps upon the parties to them, nevertheless shall come within the compass and purview of the Act; that is to say, that all arrangements of this description that shall *hereafter* be entered into shall operate as the statute provides; and that all those which have been already entered into shall also come within the scope and operation of the Act, provided they are in such a condition that the three months' notice (which the Act provides as one of the necessary conditions) may be given for the purpose of effectually doing justice between the moving and opposing parties in the arrangement, and that every one may obtain the common benefit which is always intended to be conferred in arrangements under a bankruptcy; and that each creditor may have an opportunity, in common with others, of seeing that his interests are attended to, and of sharing in the distribution, inspection, conduct, management, and the mode of winding-up the estate. We have considered the subject with a view to the deliberation which is due to it as a matter of some importance. Such being the opinion of the Court, this deed, which was not only entered into but was also completed before the passing of the Act of Parliament, does not come within the operation of the 224th section. The deed is no bar to the plaintiff's claim, and the plea is bad. I may also add, that my Brother *Talfourd*, in *Marsh v. Higgins*, expresses a similar opinion as to the effect of the 224th section, with respect to the notice required by the Act. The plaintiff is, therefore, entitled to our judgment.

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ALDERSON, B.—The legislature could not have intended to compel the remaining creditors, when a deed of arrangement had been signed by six-sevenths of the whole, to be bound by the deed, when those creditors could not have the protection which this Act, for the first time, has given to them as a consideration for their being bound. The mere insertion of the word “now” cannot give such an effect to the Act. I quite agree in the modified construction of the word “now,” by which it is held to apply to an inchoate and not to a perfect arrangement, that is, to one which is in the course of proceeding at the time the Act passed. This interpretation of the word “now” gives the Act full effect, and does not make it unreasonable or unjust.

PARKE, B.—The three months’ notice, as required by the Act, will make a party cognisant of his rights, and will therefore enable him to act in the best way for the protection of his interests under the statute.

Judgment for the plaintiff.

1853.

ROSSETER, Executor, v. CAHLMANN and Another.

Jan. 19.

THIS was an action by the plaintiff, as executor of William Hutton, for goods bargained and sold, and sold and delivered, by the testator to the defendants. The defendants pleaded, that the goods mentioned were liquid goods, to wit, palm oil; and that the contract and bargain for the sale, and the sale of the goods, were made by a measure other than those authorised by the 4 & 5 Will. 4, c. 63, intituled &c., or any aliquot part thereof, to wit, by the gallon, old measure, contrary to the said statute.

Replication, that the said contract and bargain were for the sale of the said palm oil, at a certain rate or price per gallon, old measure, the said oil to be had or procured by the said W. Hutton in parts beyond the seas, to wit, on the coast of Africa, and to be shipped in those parts in a vessel of the defendants, to be sent there by the defendants for the purpose of receiving the same; the said oil to be put alongside the said vessel by the said W. Hutton, in casks for stowing the quantity in gallons old measure as aforesaid; quality and condition of the said oil and casks to be approved and agreed by the supercargo or master of the said vessel, as the agent in that behalf of the defendants, before it should leave the shore, and no question on either point to be raised; and further, that the said contract and bargain, so far as they related to the measurement of the said oil and delivery to and shipping the same on board the said vessel, and the receipt thereof by the defendants in manner aforesaid, were wholly to be performed in the said parts beyond the seas, and not otherwise or elsewhere; and that the said contract, bargain, and sale were not in any manner or sense, save as herein mentioned, made by a measure authorised by the said Act of Parliament, or any aliquot part thereof, as alleged in the plea.

The 6th section of the 4 & 5 Will. 4, c. 63, which abolishes the use for the future of certain weights and measures, and the 21st section, which enacts, that "any contract, bargain, or sale made by any such weights or measures, shall be wholly null and void"—do not render void a contract entered into in the United Kingdom for the sale of goods to be weighed or measured by the weights and measures mentioned in the 6th section, unless such goods are also weighed or measured in this country.

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Rejoinder, in substance, that, by the terms of the contract and sale, the goods were to be paid for within the realm of England.

Demurrer, and joinder.

Montague Smith in support of the demurrer.—A contract entered into within this realm with respect to goods to be measured in a foreign country by measures which are prohibited here, is not rendered void by the 5 & 6 Will. 4, c. 63. The 6th section of that statute abolishes the use of the gallon, old measure, and the 21st section inter alia enacts, that “any contract, bargain, or sale made by any such weights or measures, shall be wholly null and void.” But the latter section applies only to those contracts where the goods are measured in pursuance of the contract within this realm. This is apparent from the preambles of the several statutes that have been passed with a view to the regulation of weights and measures in use at different periods in this country. If such a contract as that disclosed upon these pleadings were held to be within the statute, and illegal, the great commerce of this mercantile country could not be carried on.—He was then stopped by the Court.

Field contra.—This contract is illegal within the true meaning of the 21st section of the Act. The 6th section absolutely prohibits the use of the gallon, old measure. The statute was passed to carry out the objects which had not been properly effected by the 5 Geo. 4, c. 74, and the 6 Geo. 4, c. 12, by creating an uniformity in the standard weights and measures. [*Pollock*, C. B.—The 5 Geo. 4, c. 74, appears, by the language of its preamble, to have been passed that “certain standards of weights and measures should be established throughout the *United Kingdom of Great Britain and Ireland*.” The 6th section of this Act does not mean that such measures as are there men-

tioned shall be abolished everywhere, but merely throughout the realm. The Act does not prohibit the use of foreign measures, and the contract would have been valid if the parties had agreed for the sale of the goods according to some African measure. *Alderson, B.*—What is there in the Act to prevent two foreigners from entering into a contract in this country for the delivery of 100 chaldrons of coal at Antwerp?—and yet the use of the chaldron measure is abolished in this country. *Parke, B.*—The Act applies to those contracts only which are to be performed by the commodities being measured in the United Kingdom. The whole Act shews that the words of the 21st section are to have that limitation put upon them. It would be absurd to hold that, where a contract is made here for the sale of goods in India or China, or in some other distant foreign country, it would be necessary to send out English weights and measures. The Act was intended to regulate the transactions of buying and selling which take place within this realm.] Some of the old Acts, as for instance the 2 Hen. 6, c. 11, and the 18 Hen. 6, c. 17, are applicable to foreign measures, such as wine. [*Parke, B.*—Those Acts are applicable to the *importation* of foreign articles, in which cases the wine must be measured in pursuance of the Acts.]

POLLOCK, C. B.—We are all clearly of opinion that the 5 & 6 Will. 4, c. 63, does not apply to this kind of contract, for the reasons which have been given by the Court in the course of the argument. Our judgment therefore must be for the plaintiff.

PARKE, B., ALDERSON, B., and MARTIN, B., concurred.

Judgment for the plaintiff.

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Jan. 25.

PLATT and Another v. ELSE and Another.

In an action for the infringement of a patent, the Court (since the Common Law Procedure Act) allowed the defendant to plead—first, not guilty; secondly, that the patentee was not the inventor; thirdly, non concessit; fourthly, that the invention was not a manufacture; fifthly, that the invention was not new; and, sixthly, that no sufficient specification was enrolled.

THIS was an action for the infringement of a patent.—The declaration stated, that one E. Hartley was the first and true inventor of a certain new manufacture—that is to say, of a certain improvement in machinery or apparatus to be employed in the preparation and spinning of cotton and other fibrous substances; and thereupon her Majesty the Queen, by letters patent, dated the 11th of December, 1848, granted to him, his executors, &c. the sole privilege to make, use, exercise, and vend the said invention within England for the term of fourteen years; that a specification, describing the nature of his said invention, was duly enrolled in Chancery within six months; that on the 13th of July, 1849, E. Hartley assigned the patent to the plaintiffs; that the plaintiffs afterwards entered a disclaimer of the words “and other fibrous substances” in all such parts of the letters patent as might imply that the said invention was applicable to or related to the manufacture of flax.—The declaration then alleged that the defendants infringed the patent.

The defendants took out a summons under the 15 & 16 Vict. c. 76, s. 81, for leave to plead the following matters:—First, not guilty; secondly, that the patentee was not the first and true inventor; thirdly, non concessit; fourthly, that the invention was not a manufacture; fifthly, that the invention was not new; sixthly, that no sufficient specification was enrolled. The application was supported by an affidavit of the defendants’ attorney, which stated that he was advised and believed that the defendants had just ground to traverse the several matters proposed to be traversed by the pleas. The summons was heard on the 3rd of January, before

Martin, B., who allowed all the pleas except the third and sixth; and on the 15th of January

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Hindmarch moved for leave to add those pleas.—The plea of non concessit is necessary, in order to raise the objection that the title of the patent does not correctly describe the invention. That plea does not deny the grant of the letters patent, but their effect and operation: *Bunnett v. Smith* (a), *Nickels v. Ross* (b), *Bedells v. Massey* (c), *Baddeley v. Leppingwell* (d), Co. Lit. 260. a., *Morgan v. Seaward* (e), *Hynde's case* (f). [*Parke*, B., referred to *Cooke v. Blake* (g).] The defendants ought also to be allowed to traverse the sufficiency of the specification. Where the specification, in describing the invention, combines that which is new with that which is old, the objection cannot be taken advantage of under a plea that the invention is not new: *Holmes v. The London and North Western Railway Company* (h).

Rule nisi granted.

Webster now shewed cause.—The plea of non concessit ought not to be allowed except upon special grounds. [*Alderson*, B.—Then, since the New Rules, how can the objection be raised that the title of the patent does not correctly describe the invention?—as in the case of *Lord Cochrane v. Smethurst* (i), where the patent was for “an improved method of lighting cities, towns, and villages,” but the specification merely described an improved lamp.] The proper plea would be, that the specification did not describe the invention, or that the invention was different from that stated in the specification. In the old cases, where the plea of non concessit was allowed, the subject-

(a) 13 M. & W. 552.

(b) 8 C. B. 679.

(c) 8 Scott N. R. 337.

(d) 3 Burr. 1544.

(e) 2 M. & W. 544.

(f) 4 Rep. 71 b.

(g) 1 Exch. 220.

(h) 22 L. J., C. P., 57.

(i) 1 Stark. N. P. 205.

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matter related to a grant of land, or an office, or franchise, in which an interest passed to the grantee, and consequently the parties were dealing with something which had an anterior existence; but it is not so with a patent for an invention. In *Bunnett v. Smith* (a), the attention of the Court was not called to that distinction. [*Parke, B.*—The law is thus stated in *Hynde's case* (b): “So against the King’s letters patent under the great seal shewed in Court, none can deny them; but *non concessit per præd’ literas patentes* is a good plea; for, although there be such letters patent, yet perhaps nothing pass by them; and so *per consequens non concessit.*”] That doctrine was acted upon by this Court in *Bunnett v. Smith*, and by the Court of Common Pleas in *Bedells v. Massey* (c). Then, with respect to the last plea, it is submitted that the case of *Holmes v. The London and North Western Railway Company* (d) is no authority for allowing it, since the only point there decided was as to the sufficiency of the specification.

Hindmarch appeared to support the rule, but was not called upon.

PER CURIAM (e) —The rule must be absolute.

Rule absolute.

(a) 13 M. & W. 552.

(b) 4 Rep. 71 b.

(c) 8 Scott N. R. 337.

(d) 22 L. J., C. P., 57.

(e) *Pollock, C. B., Parke, B., Alderson, B., and Martin, B.*

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THE SOUTH EASTERN RAILWAY COMPANY v. THE SOUTH
WESTERN RAILWAY COMPANY. Jan. 25.

WILLES moved that the officer of the Court might be directed to enter this cause for argument at the sittings in error after the present Term. It was a writ of error from this Court to the Exchequer Chamber, and there were more than four clear days before the day of sitting; but the officer refused to receive the entry, on the ground that he was not authorised to do so, unless the cause was entered for argument on a day in Term. The 11 Geo. 4 & 1 Will. 4, c. 70, s. 8, enabled the Court of error to appoint a time for sitting either in Term or Vacation. The 155th section of the Common Law Procedure Act, 15 & 16 Vict. c. 76, enacts that, "upon such suggestion of error alleged and denied being entered, the cause may be set down for argument in the Court of error in the manner heretofore used; and the judgment roll shall, without any writ or return, be brought by the Master into the Court of error in the Exchequer Chamber, &c., on the day of its sitting, at such time as the Judges shall appoint, either in Term or in Vacation," &c. Then, by Reg. Gen., Hilary Term, 16 Vict. r. 67, "after the suggestion of error in law alleged and denied, as prescribed by the Common Law Procedure Act, 1852, is entered, either party may set down the case for argument, and forthwith give notice in writing to the opposite party, and proceed to the argument thereof, as on a demurrer, without any rule or motion for a concilium." That rule is the same as Reg. Gen., H. T., 1 Will. 4, r. 14, under which it seems to have been the practice to enter the cause ten days before the day of argument: 1 Chit. Arch. 505.

Under Reg. Gen., H. T., 16 Vict. r. 67, a cause may be entered for argument in the Exchequer Chamber four clear days before the first day appointed for hearing arguments, whether in Term or Vacation.

PARKE, B.—The 67th rule of Hilary Term, 16 Vict., says,

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that either party may set down the case and proceed to the argument as on a demurrer; therefore all that is required is, that the cause should be entered four clear days before the first day appointed for argument, whether in Term or Vacation.

POLLOCK, C. B., ALDERSON, B., and MARTIN, B., concurred.

Application granted.

Jan. 29.

HOBSON v. NEALE.

A testator devised to trustees his real estates, upon trust to raise a sufficient sum to pay debts and legacies, and upon further trust to pay his two daughters annuities of 300*l.* each; and he directed that, subject to those trusts, the trustees should stand seised of the real estates, in trust for his brother for life, and, after his

BY order of the Master of the Rolls, the following case was stated for the opinion of this Court:—

Samuel Hobson, on the 7th of March, 1822, made and published his will in writing, duly executed and attested, and thereby appointed T. Neale, T. Hutton, and R. Hooper, executors and trustees; and, after directing payment of his funeral and testamentary expenses, debts, &c., out of his personal estate, he devised unto and to the use of his said trustees, their heirs and assigns, all his freehold messuages, lands, tenements, and hereditaments, in the county of York, and all other his real estate (subject and chargeable, as to his said estate in the county of York, to and with the sum of 2000*l.* secured by mortgage thereof), upon trust

decease, in trust for his children: provided that it should be lawful for the trustees, with the consent of the testator's brother during his life, and after his decease with the consent of the persons beneficially entitled, to sell the whole or any part of the real estate, and out of the purchase-money invest so much as would be sufficient to pay the annuities of 300*l.* The testator died leaving his two daughters, his brother, and seven children of his brother, surviving. The trustees sold a part of the real estate, and paid the debts and legacies, when it was found that the rents of the residue of the real estate were not sufficient to pay the annuities, whereupon a bill in Chancery was filed by the testator's brother and his children against the trustees and the testator's daughter; and in pursuance of an order of the Court, the residue of the real estates was sold, and 20,000*l.*, part of the purchase-money, invested, and the interest thereof applied in payment of the annuities. The testator's daughters and brother having afterwards died, the brother's children became entitled to the 20,000*l.*, when the Crown claimed legacy duty on that sum:—*Held*, that, if the Court of Chancery acted on their general power of ordering the sale of real estate to satisfy charges, legacy-duty was not payable; but if the Court acted on the clause in the will, and, in consequence of the will containing that clause, compelled the trustees to execute the power, legacy-duty was payable, inasmuch as, in that case, the sale of the real estate was substantially by the direction of the testator himself.

that the survivors and survivor of them, &c., should, by mortgage or sale of the hereditaments and real estates thereby devised, or a competent part thereof, or by and out of the rents, issues, and profits thereof, or by cutting down timber or other trees, &c., levy and raise such sum and sums as should be sufficient to pay, and should accordingly pay (after his personal estate, not specifically bequeathed, should be applied so far as the same should extend), his funeral expenses and the expenses of proving his will, and all sums secured by mortgage of his freehold estates, and all his bond, simple contract, and other debts, and his pecuniary legacies, &c.; and upon further trust, that the said trustees or the survivors, &c. should levy and raise by the ways and means aforesaid, yearly and every year during the respective lives of his two infant daughters, Harriet and Louisa Hobson, two annuities of 300*l.* each for their respective, sole, and separate use, &c. (The will then gave power to the daughters, in case of marriage, to appoint 6000*l.* each as portions for their children.) And the testator further directed that his said trustees and the survivors, &c., should stand seised of his real estates thereby devised, subject to the several trusts and charges aforesaid, in trust for his brother George Hobson during his life, and after his decease, in trust for the children of his said brother, living at the testator's decease, &c. And in the said will was contained a proviso, that the exercise of the power of mortgaging his said estates, or any part thereof, should not preclude his said trustees or trustee for the time being, if he or they should deem it expedient, from afterwards selling all or any part of his said estates for the purpose of paying off such mortgage or mortgages, or for any other of the purposes of that his said will. And the testator further provided by his said will, that, notwithstanding any of the trusts aforesaid, it should be lawful for his said trustees or the survivors, &c., at any time or times after his decease, with the consent of his

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said brother George Hobson during his life, and after his decease then with the consent of the person or persons beneficially entitled to the reversion or remainder of his said estate in the county of York, subject to the charges thereon as aforesaid, or with the consent of such or so many of the persons beneficially entitled as aforesaid, if more than one, as should then be of the full age of twenty-one years, to sell and dispose of the whole or any part of his said estate in the county of York; and that his trustees, or the trustees or trustee for the time being, should, out of the purchase money arising from such sale, invest in their names so much, either in the 3*l*. or 4*l*. per Cent. Annuities, as would be sufficient, out of the dividends thereof, to pay and satisfy the said yearly sums of 300*l*. and 300*l*.; and should by deed settle the said Bank Annuities, so that each of his said daughters might be entitled to receive the income arising from one moiety thereof for her life; and so that each of his daughters might have the power of disposing of one moiety of the principal of the said stock, in like manner as they had of disposing of the said sum of 6000*l*. And it was further provided by the will, that, in case the testator's daughters should not exercise the said power of appointing 600*l*. in favour of their children, or of appointing the said Bank Annuities, then the same should fall into and be considered as part of the residue of his real estate, and be applied accordingly.

The testator died on the 5th of April, 1822, without having revoked or altered his will. The testator left his said two daughters, his brother George, and seven children of his brother, surviving. The personal estate not being sufficient for the payment of the debts and legacies, the trustees sold a part of the real estate and paid such debts and legacies. It was then found that the rents of the residue of the real estate were not sufficient to pay the annuities of 300*l*. each to the testator's daughters;

and, in May, 1824, a bill in Chancery was filed by George Hobson and his children, who were then all infants, against the executors and two daughters of the testator, which set forth the will and death of the testator, and stated the insufficiency of the rents to pay the said annuities; and that the plaintiffs had been advised that it would be for their benefit that the remaining estates should be sold under the power contained in the will, and that the plaintiff, George Hobson, thereby expressed his consent to the exercise of such power by the trustees; and that the plaintiffs had applied to the trustees, and requested them to proceed to a sale of such estates, but that the trustees had declined so to do; and the bill then prayed (*inter alia*) that it might be referred to the Master to inquire whether it would be for the benefit of the plaintiffs that the whole or any part of the remaining estates should be sold, and that, if he should be of that opinion, he should be directed to proceed to a sale thereof.—The case then stated the answers of the defendants, the decree of reference to the Master, the Master's report thereon, and a decree of the 14th of February, 1828, whereby it was ordered that the real estate of the testator remaining unsold should be sold. In pursuance of that order the real estate was sold, and the sum of 20,000*l.*, part of the purchase money, was laid out in the purchase of Bank 3*l.* per Cent. Annuities, out of the interest of which 300*l.* a year was paid to each of the testator's daughters during their lives. On the 6th of July, 1835, George Hobson died; on the 14th of September, 1847, the testator's daughter Louisa died; and on the 28th of March, 1849, the testator's daughter Harriet died; whereupon the children of George Hobson became entitled to the 20,000*l.*; and they presented a petition to the Court of Chancery to have the same transferred accordingly; but the Commissioners of Inland Revenue required the executors to pay legacy duty on the said sum.

The question for the opinion of the Court was, whether

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any, and if any, what legacy duty is payable in respect of the said sum of 20,000*l.* Bank 3*l.* per Cent. Annuities, so carried over to answer the said annuities of 300*l.* and 300*l.*, and being part of the proceeds of the sale of the real estate devised by the will of the said testator Samuel Hobson, and which was sold under the circumstances and in the manner detailed in the case.

Phinn, for the Crown.—The sum in question is subject to legacy duty under the 55 Geo. 3, c. 184 (a), as money arising from the sale of real estate "*directed to be sold.*" Formerly it was doubted whether a case came within the statute, unless the estate was sold in pursuance of the directions of the will; but later decisions establish that it is not necessary that the will should contain an express direction to sell, and that, if there be a *power* of sale, and that is exercised, the execution of the power is within the terms of the statute. The *Attorney-General v. Simcox* (b), in which all the previous decisions were reviewed, is a

(a) Schedule, Pt. III. Legacies II.—"For every legacy, specific or pecuniary, or of any other description, of the amount or value of 20*l.* or upwards, given by any will or testamentary instrument of any person who shall have died after the 5th day of April, 1805, either out of his or her personal or moveable estate, or out of or charged upon his or her real or heritable estate, or out of any monies to arise by the sale, mortgage, or other disposition of his or her real or heritable estate, or any part thereof, and which shall be paid, delivered, retained, satisfied, or discharged after the 31st day of August, 1815."

"And also for the clear residue (when given to one person), and for every share of the clear residue (when given to two or more persons) of the monies to arise from the sale, mortgage, or other disposition, of any real or heritable estate directed to be sold, mortgaged, or otherwise disposed of, by any will or testamentary instrument of any person, who shall have died after the 5th day of April, 1805, (after deducting debts, funeral expenses, legacies, and other charges first made payable thereout, if any,) where such residue, or share of residue, shall amount to 20*l.* or upwards," &c.

(b) 1 Exch. 749.

conclusive authority to that effect. There real estates were devised to trustees, on trusts, which gave them the option either of allotting the estates among certain persons, or of selling them and distributing the money; and the trustees having, in the exercise of their discretion, sold the estates, it was held that legacy duty attached. The Court there say, that "the trustees, by selling, have shewn conclusively that they did think the most expedient course was to sell; and so in the event there was a direction to sell." It can make no difference in principle whether the power to sell depends upon the option of the trustees, or, as here, upon the consent of the parties beneficially entitled. If the power is exercised within the terms of the will, the duty attaches.

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Bagshawe, for the plaintiffs.—The question is, whether the testator can be said to have directed a sale, so as to produce a fund to satisfy the annuities. There is no direction expressed, and therefore reliance must be placed on the doctrine laid down in *The Attorney-General v. Simcox* (a). In that case, however, the trustees had an absolute and uncontrolled power to regulate the destination of the property. But here the testator, after making certain charges, provides for them as if the estate were to remain unsold. Where trustees are directed to sell real estate, and distribute the purchase-money, any one of the parties entitled to it may compel a sale. On the other hand, where the trust to sell is only the machinery for raising money to satisfy a charge, it is competent for any one of the persons interested to avoid a sale, just as any party interested may pay off a mortgage. This is not a trust to sell the real estate, but a power inserted in anticipation of the difficulty which would otherwise arise in the case of real estate charged with annuities. The circumstance of the consent of the beneficiaries being necessary, assimilates the

(a) 1 Exch. 749.

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case to that of a power of sale in a real property settlement, which has never been considered as converting the realty into personalty. Again, the purposes for which the sum of 20,000*l.* was raised having been determined, it is, by the express directions of the will, to fall into and be considered as part of the residue of the real estate. A sale under the power is a condition which has not been performed, for the trustees declined to sell, and thereupon the suit in Chancery was instituted. The bill alleges, that the real estate is insufficient to satisfy the annuities, in which case the annuitants might compel a sale, even in the absence of a power: *Picard v. Mitchell* (a). The true criterion in cases of this kind is, whether the language of the testator amounts to a direction to sell, and so of itself converts the realty into personalty, or whether it merely invests the trustees with a discretionary power of sale for the purpose of satisfying debts or charges: *Williamson v. The Advocate General* (b). If it were not so, legacy duty would attach in every case where debts or charges required a sale of real estate, though the testator intended that the land should remain. This case falls within the principle of the decision in *In re Evans* (c), which does not conflict with *The Attorney-General v. Simcox* (d), and is recognised as law by the House of Lords in *Williamson v. The Advocate General*. The ordinary rule is, that the subject ought not to be charged, except by clear and unambiguous language.

Phinn in reply.—The sale took place under the power contained in the will, and not under the general authority of the Court of Chancery. The intention of these Acts, as stated by the Court of Exchequer in Scotland in their judgment in *The Advocate-General v. Ramsay's Trustees* (e) is, "that everything which comes, or is directed to come

(a) 14 Beav. 103.

(b) 10 Cl. & F. 1.

(c) 2 C. M. & R. 206.

(d) 1 Exch. 749.

(e) 2 C. M. & R. 224, note.

into the hands of the donee in the shape of a money gift or bequest, should pay the tax." That principle was followed in the *Attorney-General v. Simcox*, and this case falls within it.

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PARKE, B.—If the estate was sold in the exercise of the power contained in the will, the sale was a thing directed to be done by the testator, and the legacy duty attaches; but if the sale was under the general power of the Court to direct a sale of real estate for the purpose of satisfying charges, then the duty does not attach.

ALDERSON, B.—The whole question turns upon this, did the Court of Chancery act because there was this power in the will, or would the Court have acted precisely the same if there had been no such power?

The following certificate was afterwards sent to the Master of the Rolls:—

"We have heard this case argued by counsel, and have considered it; and we are of opinion that if the Court of Chancery, when they made their decree of the 14th of February, 1828, whereby they ordered the sale in this case of the testator's estate, really acted on their general power of ordering sales of real estate, when the corpus of such estate is charged with an annuity, and such annuity is in arrear, and on that ground ordered the sale of this property in order the better to secure the payment of the annuities to the testator's daughters, then the legacy duty is not payable to the Crown. But if that Court really acted on the clause in the testator's will, and, in consequence of the will containing this clause, compelled the trustees to execute the power and exercise the discretion thereby given to them by the testator, then the legacy duty is payable to the Crown; inasmuch as we think that, in that

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case, the sale of the real estate was substantially by the direction of the testator himself. And we leave it to the Court of Chancery to determine whether, in fact, this case falls under the second or first of these two alternatives.

(Signed) F. POLLOCK, E. H. ALDERSON,
 J. PARKE, S. MARTIN.

Jan. 29.

In the Matter of the STAMP DUTY ON A CONVEYANCE from
 EARL MOUNT EDGEUMBE and THOMAS GILL to THE PLY-
 MOUTH GREAT WESTERN DOCK COMPANY.

By an inden-
 ture, between
 M. of the first
 part, G. of the
 second part, a
 Dock Company
 of the third
 part, and P. of
 the fourth part,
 reciting that
 M. had agreed
 to sell the Com-
 pany certain
 land for 9000*l.*;
 also reciting
 that G. had

THIS was a case stated by the Commissioners of Inland Revenue under the provisions of the 13 & 14 Vict. c. 97, s. 15, to enable the Plymouth Great Western Dock Company to appeal to the Court of Exchequer against the determination of the Commissioners as to the stamp duty chargeable on the deed hereinafter mentioned.

The deed is an indenture, dated the 2nd of March, 1852, and made between the Earl of Mount Edgecumbe of the first part, Thomas Gill of the second part, the

agreed to sell the Company a certain pier; and that it was agreed that the consideration for such purchase should be 37,000*l.*; and that 10,000*l.* only should be paid in gross by the Company to G., and that 15,000*l.* should be represented by an annual rent-charge of 750*l.*, redeemable on payment of 15,000*l.*, and that 12,000*l.* should be represented by an annual rent-charge of 600*l.*, redeemable on payment of 12,000*l.*; (after stating the conveyance from M. to the Company for 9000*l.*), it was witnessed, that, in consideration of the rent-charges of 750*l.* and 600*l.* payable to G., and in consideration of 10,000*l.* to G. paid by the Company, G. conveyed the said pier to P., to the use (amongst others) that G. should receive out of the rents a yearly rent-charge of 750*l.* and 600*l.*. The indenture then provided that the Company might at any time redeem the rent-charge of 750*l.* upon payment of 15,000*l.*, after twelve months' notice; and that, after a certain time, G. might by notice require the Company to redeem the rent-charge of 600*l.*, and pay him 12,000*l.* in redemption thereof; and that if no such notice should be given by G., then that the Company might redeem that rent-charge on payment of 12,000*l.*. The Commissioners of Inland Revenue having required this deed to be stamped under the 13 & 14 Vict. c. 97, Sched. tit. "Conveyance," with an ad valorem duty of 230*l.*, as a conveyance upon the sale of property for 9000*l.* and 37,000*l.*:—*Held*, that, as G. might, by his own act, compel the Company to redeem the rent-charge of 600*l.* by payment of 12,000*l.*, that sum was part of the purchase or consideration money, within the meaning of the statute, and subject to the ad valorem duty; but that such duty was not payable on the 15,000*l.*, and therefore the stamp must be reduced from 230*l.* to 155*l.*

Plymouth Great Western Dock Company of the third part, and George Pridham of the fourth part. The deed recites (inter alia), that the said Earl was seised of the manor of East Stonehouse in the county of Devon, and also of lands contiguous to Millbay in the Port of Plymouth; that by an Act of Parliament Thomas Gill was empowered to construct upon the lands and grounds therein mentioned a pier or jetty, with quays, wharfs, &c.; that Thomas Gill had constructed the same, and was entitled to the fee-simple thereof, &c.; that by another Act of Parliament, the Plymouth Great Western Dock Company was incorporated and empowered to construct docks at Millbay, and for that purpose to purchase the said pier and the lands connected therewith.—The deed then recited an agreement by the Earl of Mount Edgecumbe to sell to the Company such of the shores of Millbay as belonged to the manor of East Stonehouse, for a perpetual rent-charge of 220*l.*, and the sum of 9000*l.*—That an agreement had been entered into between T. Gill and the Company, by which T. Gill had agreed to sell, and the Company to purchase, the said Millbay Pier, and all tolls, rights, &c. vested in T. Gill; and that it was agreed that the consideration for such purchase should be the sum of 37,000*l.*; and that the sum of 10,000*l.* only, part of the sum of 37,000*l.*, should be paid in gross by the Company to T. Gill; and that the sum of 15,000*l.*, further part of the sum of 37,000*l.*, should be represented by an annual rent-charge of 750*l.*, commencing from the 29th of September, 1848, and payable to T. Gill, his heirs, &c. half-yearly, and charged as thereafter mentioned on the property of the Company; such annual rent-charge, nevertheless, to be subject to redemption at any time thereafter, on payment by the Company to T. Gill, his heirs &c., of the sum of 15,000*l.*, on twelve calendar months' notice in writing of their intention of paying the same being given by the Company to T. Gill, his heirs, &c.; and that the sum of 12,000*l.*, residue of the

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said sum of 37,000*l.*, should be represented by an annual rent-charge of 600*l.*, commencing from the 29th of September, 1848, and payable to T. Gill, his heirs &c., half-yearly, and charged as thereafter mentioned on the property of the Company; such annual rent-charge of 600*l.*, nevertheless, to be subject to such redemption or repurchase, conveyance, or merger, on payment by the Company to T. Gill, his heirs &c., of the sum of 12,000*l.*, at such times, and on such notice, and in such manner as thereafter respectively contained.

(The indenture then stated the conveyance from the Earl of Mount Edgecumbe to the Company in consideration of the rent-charge of 200*l.* and the sum of 9000*l.*)—And by the said indenture it is further witnessed, that, in pursuance of the agreements, and in consideration of the yearly rent-charges of 750*l.* and 600*l.* thereafter made payable to T. Gill, his heirs &c., and in consideration of the sum of 10,000*l.* to T. Gill, paid by the Company, (the receipt of which sum of 10,000*l.*, and that the same, together with the yearly rent-charges of 750*l.* and 600*l.*, was in full for the absolute purchase in fee simple in possession, free from incumbrances, of all and singular the said pier and other hereditaments, powers, rights, &c. thereafter described or referred to, and thereby conveyed by T. Gill, and for all compensation on account of the same, and of all rights and appurtenances thereto, as he T. Gill did thereby admit;) he T. Gill did direct, limit, and appoint, that all singular the pier, hereditaments, &c., thereafter granted and conveyed, should thenceforth go, remain, and be to the uses thereafter declared concerning the same.

(The indenture then witnessed, that T. Gill conveyed the Millbay Pier to George Pridham in fee, to the use (amongst others) that T. Gill should receive out of the rents a yearly rent-charge of 750*l.* and 600*l.*, subject to redemption as thereafter mentioned.)

And by the said indenture it was provided, agreed, and declared, that if at any time thereafter the Plymouth Great Western Dock Company should give, or cause to be given, to T. Gill, his heirs, &c. twelve calendar months' notice in writing of their intention to make such payment as next thereafter mentioned, and should, on or at any time after the expiration of twelve calendar months, to be computed from the time of giving such notice, pay or cause to be paid to T. Gill, his heirs, &c., the sum of 15,000*l.*, then and in such case, immediately upon such sum of 15,000*l.* being so paid, the said yearly rent-charge of 750*l.* should cease and determine.

And by the said indenture it is also provided and mutually covenanted, agreed, and declared, by and between the Company and T. Gill, that if at any time after the 29th September, 1858, T. Gill, his heirs, &c., should be desirous of having the yearly rent-charge of 600*l.* redeemed or repurchased, and should give or cause to be given to the Company notice in writing requiring such redemption or repurchase to be made at the expiration of twelve calendar months from the giving of such notice, then that the Company should, at the expiration of twelve calendar months, to be computed from the time of such last-mentioned notice being given, pay or cause to be paid to T. Gill, his heirs, &c., the sum of 12,000*l.* in redemption or repurchase of the yearly rent-charge of 600*l.* And further, that, if after the 29th September, 1858, no such notice as last mentioned should be given by T. Gill, his heirs, &c., it should be lawful for the Company, at any time after the 29th September, 1868, to give or cause to be given to T. Gill, his heirs, &c., notice in writing of their intention to redeem or repurchase the annuity of 600*l.*, and to make such payment as next thereafter mentioned, and on or at any time after the expiration of twelve calendar months, to be computed from the time of such last-mentioned notice being given, to pay or cause to be paid

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to T. Gill, his heirs, &c., the sum of 12,000*l.* in redemption or repurchase of the yearly rent-charge of 600*l.* (Then followed usual provisions for the redemption of rent-charges.)

The Company, by their solicitors, on the 15th March, 1852, presented to the Commissioners of Inland Revenue the said deed of the 2nd March, 1852, stamped with a duty of 95*l.*, being the ad valorem duty in respect of the two sums of 9000*l.* and 10,000*l.* therein mentioned to be paid to the said Earl and T. Gill respectively, and with two stamps of 1*l.* 15*s.* each, and progressive duty stamps, and desired to have the opinion of the Commissioners as to the stamp duty with which such deed was chargeable; and the Commissioners, being of opinion that the deed was chargeable under the said Act of Parliament with an ad valorem duty of 230*l.* as a conveyance upon the sale of property by the said Earl and T. Gill to the Company for 9000*l.* and 37,000*l.* respectively, assessed and charged the sum of 135*l.* as the further ad valorem duty which the Company paid; and the deed was stamped accordingly.

The question for the opinion of the Court is, whether the deed of the 2nd of March, 1852, is chargeable with any, and what amount of, ad valorem duty exceeding the sum of 95*l.*?

A. J. Stephens for the appellant(*a*).—The case involves two questions: first, whether the rent-charge of 750*l.*, redeemable at the option of the purchasers for 15,000*l.*, is in itself a consideration requiring an ad valorem stamp; and secondly, whether the rent-charge of 600*l.*, redeemable at the option of the purchasers for 12,000*l.*, or which they

(*a*) *Phinn*, on behalf of the Crown, claimed the right to begin; but the Court said they had already decided that the party appealing was to begin: *Marquis of Chandos v. Commissioners of Inland Revenue*, 6 Exch. 464.

may, after notice from the vendor, be compelled, in 1858, to purchase for that sum, is in itself such a consideration. It is submitted, that the Stamp Act, 13 & 14 Vict. c. 97, Sched. tit. "Conveyance" (a), only requires the ad valorem

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(a) "CONVEYANCE, whether grant, disposition, lease, assignment, transfer, release, renunciation, or of any other kind or description whatsoever, *upon the sale of any lands, tenements, rents, annuities, or other property, real or personal, heritable or moveable, or of any right, title, interest, claim, in, to, out of, or upon any lands, tenements, rents, annuities, or other property, that is to say, for and in respect of the principal or only deed, instrument, or writing, whereby the lands or other things sold shall be granted, leased, assigned, transferred, released, renounced, or otherwise conveyed to or vested in the purchaser or purchasers, or any other person or persons by his, her, or their direction—*

"Where the purchase or consideration money therein or thereupon expressed shall not exceed 25*l.* . . . 2*s.* 6*d.*

"And where the same shall exceed 25*l.* and not exceed 50*l.*, 5*s.* [And so on, up to the purchase money of 600*l.*—certain fixed duties.]

"And where the purchase or consideration money shall exceed 600*l.*, then, for every 100*l.*, and also for any fractional part of 100*l.* . . . 10*s.*

"And it is hereby directed, that the purchase-money or consideration *shall be truly expressed*

and set forth in words at length in or upon every such principal or only deed or instrument of conveyance; and where such consideration shall consist, either wholly or in part, of any stock or security, the value thereof respectively, to be ascertained as hereinafter mentioned, shall also be truly expressed and set forth in manner aforesaid in or upon every such deed or instrument; and such value shall be deemed and taken to be the purchase or consideration-money, or part of the purchase or consideration-money, as the case may be, in respect whereof the ad valorem duty shall be charged as aforesaid.

"And where the consideration, or any part of the consideration, shall be any stock in any of the public funds, or any Government debenture or stock of the Bank of England or Bank of Ireland, or any debenture or stock of any corporation, company, society, or persons or person, payable only at the will of the debtor, the said duty shall be calculated (taking the same respectively, whether constituting the whole or a part only of such consideration), according to the average selling price thereof respectively on the day or on either of the ten days preceeding the day of the date of the deed or instrument of conveyance, or if no sale shall have taken

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duty on the purchase or consideration money actually paid. In *Wilmot v. Wilkinson (a)*, *Bayley, J.*, says, "By the Stamp Act, the ad valorem duty is imposed upon the conveyance of an interest, not upon the right to call for such a conveyance." Under the deed in question, there is an actual sale of 10,000*l.* worth of property, the vendor reserving to himself an interest in it, to the extent of 1350*l.* per annum, giving the purchaser the option of redeeming that at any time, and also of purchasing the entire interest for 27,000*l.*; and, at the same time, the vendor reserves to himself the right of selling the rent-charge of 600*l.* on payment of 12,000*l.* The Commissioners of Inland Revenue claim an ad valorem duty upon the reserved interest of 1350*l.* per annum, as upon 27,000*l.*, the valuation of it. The consideration expressed on the face of the deed is 10,000*l.*, and two rent charges, which may never be redeemed. In *Coates v. Perry (b)*, *Park, J.*, says, "The statute has only required the ad valorem duty to be paid in cases under the word 'Conveyance,' where the purchase or consideration money therein or thereupon expressed shall amount to certain sums therein specified, and according to the amount of which such duty is regulated. That, therefore, evidently shews that the legislature intended that such duty should be payable on an immediate money consideration expressed upon the face of the instrument." Here the only immediate money consideration so expressed is 10,000*l.* In the case of *The Marquis of Chandos v. The Commissioners of Inland Revenue (c)*, the Court asks, "Why may not a

place within such ten days, then according to the average selling price thereof on the day of the last preceding sale; and if such consideration or part of such consideration shall be a mortgage, judgment, or bond, or a debenture, the amount whereof shall be recoverable by the holder, or

any other security whatsoever, whether payable in money or otherwise, then such calculation shall be made according to the sum due thereon for both principal and interest."

(a) 6 B. & C. 510.

(b) 6 Moore, 197.

(c) 6 Exch. 464.

man acquire an equity of redemption in an estate, subject to a charge, and allow the mortgage or charge to continue, taking the benefit of the surplus rents and profits? And why should he pay a duty for the entire property, which he may never choose to acquire, and which he is not bound by his contract with the vendor to acquire?" Here the vendee was not bound by his contract to redeem these charges.

The Court then called on

Phinn, for the Crown.—The recited agreement and the operative part of the deed shew, that the consideration for the purchase was 37,000*l.*, to be paid in the manner provided. The expression used is, that the sum of 27,000*l.* shall be *represented* by these two rent charges. Therefore the parties themselves have put a value on the security, and that is expressed on the face of the instrument, as required by the 13 & 14 Vict. c. 97, Sched. tit. "Conveyance" (a). With respect to the rent charge of 600*l.*, the vendor may compel the vendees to redeem it for 12,000*l.*, upon giving the stipulated notice. [*Parke*, B.—It can make no difference in the duty that the consideration is to be paid at a future time.] The duty is imposed, not on the sum actually paid at the time of the conveyance, but on the consideration expressed on the face of the instrument *to be paid*. [*Parke*, B.—The clause in the Schedule of the Act, which prescribes the mode of calculating the value, where the consideration consists of stock, debentures, &c. (a), though it does not in terms provide for this case, throws a great deal of light upon it. Where the consideration is a debenture, the amount of which the vendor may get at any time, the sum due thereon is to be the consideration or purchase-money. This case falls within that prin-

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(a) *Ante*, p. 381.

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ciple. The vendor may, if he pleases, obtain the 12,000*l.* after the stipulated day; therefore that must be taken as part of the consideration. Upon the 15,000*l.* the stamp must be reduced by the amount of 75*l.* *Alderson, B.*—The ad valorem stamp ought to have been 155*l.* instead of 230*l.*]

POLLOCK, C. B., and MARTIN, B., concurred.

Rule accordingly.

Jan. 29. In the Matter of the Estate and Effects of BENJAMIN TAYLOR, deceased.

T., being seised in fee of certain lands, by indenture mortgaged them as a security for money lent. The indenture contained a covenant by T. to pay the principal and interest on a certain day. By another indenture, T. covenanted to pay on a certain day a further sum of money lent, and that the same lands should be charged

THIS was a rule calling on John Taylor and Benjamin Taylor, executors of Benjamin Taylor deceased, to shew cause why they should not deliver to the Commissioners of Inland Revenue an account upon oath of all the legacies and of the property of Benjamin Taylor deceased, respectively paid or to be paid or administered by them as such executors, and why the duties thereon have not been paid or should not forthwith be paid.

The affidavit of the executors, in answer to the application, stated, that John Taylor deceased, being seised in fee simple of a certain manor and lands in the county of Kent, by indenture of the 12th of September, 1822, demised the manor and lands for a term of 500 years,

ed with that sum also. T., by will, devised his real estate to B., whom he appointed his executor. T. paid the interest on the mortgage debts, but died without having paid the principal. The personal estate of T. was only sufficient to discharge his funeral and testamentary expenses. B., by will, bequeathed his real and personal estate to his two sons, whom he appointed his executors, and died without having paid the mortgage debts. The executors of B. exhausted his personalty by paying with it those debts, and on that ground claimed an exemption from legacy duty and a return of probate duty:—*Held*, that the executors were bound to pay legacy duty, and were not entitled to a return of probate duty, since they were not justified in paying the mortgage debts with the personal estate of B., notwithstanding the 11 Geo. 4 & 1 Will. 4, c. 47, s. 3, rendered them and B. liable, as devisees, to actions on the covenants in the deeds.

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by way of mortgage, to secure the sum of 7000*l.* money lent, and interest; and the said John Taylor by the said indenture covenanted to pay the sum of 7000*l.* and interest on the 12th of September, 1823. By another indenture, of the 1st of March, 1823, in consideration of a further sum of 1000*l.* lent, and already secured by the bond of the said John Taylor, he covenanted to pay the 1000*l.* and interest on the 1st of September, 1823, and that the said manor and lands should be charged and chargeable with that sum, as well as with the 7000*l.* and interest. The said John Taylor, on the 20th of August, 1835, by his will, duly made and published in manner then necessary by law for passing real estates, devised to his brother Benjamin Taylor, since deceased, the father of deponents (amongst other things) the said manor and lands, and appointed the said Benjamin Taylor, now deceased, his sole executor; and on the 24th of August, 1838, the said John Taylor died, without having altered or revoked his will, and leaving the said Benjamin Taylor, now deceased, his heir-at-law, and heir according to the custom of gavelkind, him surviving. The said Benjamin Taylor duly proved the said will, and as executor received all the personal estate of the said John Taylor, which was of inconsiderable value, and not more than sufficient to pay and discharge his funeral and testamentary expenses, and a few simple contract debts, in payment whereof respectively such personal estate was accordingly applied by the said Benjamin Taylor. The said Benjamin Taylor, on the 31st of July, 1841, by his will, duly made and published, devised and bequeathed all his real and personal estate to his two sons, deponents, their heirs, executors, and administrators, upon trust, after payment of his debts, for all his children; and he appointed deponents his executors. On the 26th of June, 1846, Benjamin Taylor, the father of deponents, died, without having altered or revoked his will; and the same was, on the 4th of December, duly proved by depo-

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nents in the Prerogative Court of Canterbury. The said John Taylor continued until his death seised of the said mortgaged property, subject to the said mortgage debts of 7000*l.* and 1000*l.*; and although he regularly, during his lifetime, paid the interest upon the said mortgaged debts, he died without having paid off any part of the principal, and without leaving any personal estate except as herein-before mentioned. The said Benjamin Taylor deceased, who, upon the death of his brother the said John Taylor, so as aforesaid succeeded to the said mortgaged property, subject to the said mortgage debts, and enjoyed the same during his life, continued during his life to pay regularly the interest on the said mortgage debts of 7000*l.* and 1000*l.*; but he did not pay off any part of either of the said principal sums. The said Benjamin Taylor deceased was, at the time of his death, possessed of certain personal estate, which was received by and came to the hands of deponents as executors as aforesaid, which to the extent of 7500*l.* was applied by them, deponents, in paying off the said mortgage debts of 7000*l.* and 1000*l.* And they did, within three years next after the date of the last-mentioned probate, claim to be allowed by the Commissioners of Inland Revenue to treat the payment of the said mortgage debts, to the extent of the said sum of 7500*l.*, as a payment of debts payable by law out of the personal estate of the said Benjamin Taylor, and to have a return of the probate duty upon the sum so paid by them in discharge of the said mortgage debts: which the Commissioners refused.

Bovill, for the executors, shewed cause upon the above affidavit.—The question is, whether the mortgage debts were properly paid by Benjamin's executors out of his personalty; for, if so, the personal estate being exhausted, the bequest is not subject to legacy duty; and, moreover, the executors are entitled to a return of probate duty. It

is necessary to consider, first, what was the position of Benjamin. It cannot be disputed that the mortgage debts were payable out of the personal estate of John; but, that being insufficient for the purpose, Benjamin, who as devisee and heir took the real estate subject to the mortgages, and who was at liberty, if he thought fit, to apply his personalty in payment of the mortgage debts, elects not to do so; therefore to that extent his personal estate is benefited, and he has shewn his intention to treat the mortgage debts as a charge upon it, by paying interest. [Parke, B.—Benjamin was under no obligation to pay off the mortgages, for they were not his debts, but the debts of John. Benjamin's executors, who are also his devisees and heirs-at-law, apply Benjamin's personal property in payment of John's debts; and then they ask for a remission of duty, because they have exonerated their estate by paying the debts of another person with their testator's money.] Secondly, Benjamin was liable to pay the mortgage debts, by virtue of the 11 Geo. 4 & 1 Will. 4, c. 47, "for the purpose of facilitating the payment of debts out of real estate." It is clear that, under the 3rd section (a) of that statute, an action at law might have been maintained against Benjamin upon the covenants of

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(a) Sect. 2 renders a devise of real estate void as against specialty creditors.

Sect. 3. "And for the means that such creditors may be enabled to recover upon such bonds, covenants, and other specialties, be it further enacted, That, in the cases before mentioned, every such creditor shall and may have and maintain his, her, and their action and actions of debt, or covenant upon the said bonds, covenants, and specialties against the heir and heirs-at-law

of such obligor or obligors, covenantor or covenantors, and such devisee and devisees, or the devisee or devisees of such first-mentioned devisee or devisees jointly, by virtue of this Act; and such devisee and devisees shall be liable and chargeable for a false plea by him or them pleaded, in the same manner as any heir should have been for any false plea by him pleaded, or for not confessing the lands or tenements to him descended."

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John for payment of the mortgage money, since the statute transfers the liability of the debtor to his heir and devisee, and Benjamin filled both characters. Therefore Benjamin in his lifetime was under a statutory obligation to pay the mortgage debts; and if he had been sued, the judgment against him would have been satisfied out of his personal estate. But further, the statute creates a personal liability on the part of Benjamin's executors, for they are his devisees; and if they had not paid the mortgage debts, they would have been subject to actions on the covenants. [*Pollock*, C. B.—Under the Act of Parliament, the debts *might* have been made their debts; but they were not. A liability to be sued does not necessarily create a debt. If a person is liable to a penalty, there is no debt until judgment is recovered. This is a peculiar parliamentary liability, viz. that if a devisee takes an estate charged with a debt, he shall be liable to be sued for it; but that does not make the debt his debt.]

Phinn appeared for the Crown, but was not called upon to argue.

POLLOCK, C. B.—None of us (a) entertain any doubt upon the subject. The statute, when not acted upon, makes no difference whatever. It created a liability to be sued; but until something is done under it, it does not change the right of property. Consequently this was, as my Brother *Parke* observed, paying John's debts with Benjamin's money. That being the case, there is no ground for the claim of return of probate duty, and the rule must be absolute to account.

Rule absolute.

(a) *Pollock*, C. B., *Parke*, B., *Alderson*, B., and *Martin*, B.

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Jan. 25.

ASSUMPSIT on a promissory note, dated the 20th of October, 1852, made by the defendant, for payment to one Robinson of 24*l.* 18*s.* 6*d.*, one month after date, and by Robinson indorsed to one Semple, and by him indorsed to the plaintiff.—Pleas (inter alia) non fecit, and the bankruptcy and certificate of the defendant; upon which issues were joined.

At the trial, before *Martin*, B., at the Middlesex Sitings in the present Term, it appeared that, in July, 1846, the defendant was arrested under a ca. sa., when, in order to obtain his discharge, he gave to Robinson, who was the attorney of the execution creditor, the sum of 5*l.*, and a blank promissory note stamp, with his name written upon it. On the 12th of May, 1851, the defendant, who had in the mean time become bankrupt, obtained his certificate; and on the 20th of October, 1852, Robinson filled up the blank stamp, by making it a promissory note for 24*l.* 18*s.* 6*d.*, payable one month after date, and indorsed it to one Semple, who indorsed it to the plaintiff for value. The defendant had no notice of the blank stamp having been used until the commencement of this action. The learned Judge left it to the jury to say whether the blank stamped paper was filled up within a reasonable time, taking into consideration the circumstances of the defendant, and the probability of his being able to pay the note. His Lordship ruled that the certificate was no bar to the action, but reserved leave to the defendant to move to enter a verdict for him on that plea. The jury having found a verdict for the plaintiff,

J. H. Hodgson (Jan. 24) moved accordingly for a new trial, on the ground of misdirection.—He submitted, first, that the plaintiff had no authority to fill up the blank

In July, 1846, the defendant, having been arrested under a ca. sa., in order to obtain his discharge gave to the attorney of the execution creditor 5*l.*, and a blank promissory note stamp with his name written on it. In May, 1851, the defendant obtained a certificate in bankruptcy; and in October, 1852, the attorney filled up the blank stamped paper, by making it a promissory note for 24*l.* 18*s.* 6*d.*, at one month's date, and indorsed it to the plaintiff for value:—*Held*, first, that it was properly left to the jury to say whether the stamped paper was filled up within a reasonable time, considering the circumstances of the defendant, and his ability to pay the note. Secondly, that there was no claim provable under the fiat, and, consequently, the certificate was no bar to an action on the note.

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stamped paper after so great a lapse of time, but was bound to do so within a reasonable time, without reference to the circumstances or condition of the defendant. On this point he cited *Aude v. Dixon* (a), *Mulhall v. Neville* (b).—Secondly, he contended that there was a debt which might have been proved under the fiat, either as a debt payable in futuro, within the meaning of the 172nd section of the 12 & 13 Vict. c. 106, or as a debt payable on a contingency, or a contingent liability, within the meaning of the 177th and 178th sections.

Cur. adv. vult.

POLLOCK, C. B., now said.—In this case, which was moved yesterday by Mr. *Hodgson*, we are of opinion that there ought to be no rule. The grounds for the application were, first, that the learned Judge ought to have directed the jury that it was unreasonable that the blank stamped paper should be filled up after so long an interval; and secondly, that the plea of the defendant's bankruptcy and certificate was an answer to the action, inasmuch as the stamped paper had been signed by the defendant before his bankruptcy. We are of opinion that there is no foundation for a new trial on either of these grounds. With respect to the first, the question was properly left to the jury. It was for them to say what was, under the circumstances, a reasonable time for filling up the note; and they found for the plaintiff, and no doubt correctly, because the plaintiff was an innocent indorsee, who had no notice whatever that any irregularity could be imputed to the instrument. With respect to the bankruptcy, we are also of opinion, looking to the clauses of the statute referred to, that there is no foundation for a rule on that ground, inasmuch as the cause of action arose after the bankruptcy. If, indeed, the parties had acted in collusion, and attempted to violate the spirit of the bankrupt law by a contrivance to create a debt which should not be barred by the certificate, that would have

(a) 6 Exch. 869.

(b) Post, p. 391.

afforded some argument to induce the Court to come to a different conclusion; but, even in that case, my present impression is, that if we decided differently we should not be administering but making the law. There is, however, no foundation for such an argument. It does not appear that there was any collusion, or attempt to concoct this instrument for the purpose of evading the effect of the bankrupt law. The object of keeping the blank stamped paper was no doubt to make use of it when the debtor, who was in difficulties, had the means of paying; and, after his bankruptcy and certificate, it was filled up and paid away for a good consideration to an innocent indorsee. Under these circumstances, we think that there ought to be no rule.

Rule refused.

MULHALL v. NEVILLE.

THIS was an action on a bill of exchange, dated the 22nd of September, 1847, drawn by the defendant upon and accepted by Page, for payment of 200*l.* four years after date, and indorsed by the defendant to Cannon, and by Cannon to the plaintiff.—Plea, that the defendant did not make the bill.—At the trial, before *Pollock*, C. B., at the Middlesex Sittings after Trinity Term, 1852, the defendant's counsel proposed to prove that, in the year 1846, the defendant, at the request of Page, signed as drawer and indorsed a blank bill-stamp paper, across which Page wrote his name as acceptor, and delivered it to Cannon, who advanced money upon it; that Cannon kept the stamped paper until July, 1851, when he filled it up, by inserting as the date the 22nd of September, 1847, and making it a bill for payment of 200*l.* four years after date, and then indorsed it to the plaintiff. The learned Judge rejected the evidence, being of opinion that the defence was not open under the above plea; and that, even if the facts were proved, they would afford no answer to the action. A verdict having been found for the plaintiff,

Knowles in the following Term (Nov. 3) obtained a rule nisi for a new trial, on the ground of misdirection, against which

Montagu Chambers shewed cause (Nov. 22), and argued that the delivery of the blank stamped paper was an implied authority to fill it up at any time within the period of the Statute of Limitations.—He cited *Russel v. Langstaffe* (2 Doug. 514), *Schultz v. Astley* (2 Bing. N.C. 544).

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Knowles and *Bovill*, in support of the rule, contended that there was an implied condition that the authority to fill up the blank paper should be exercised within a reasonable time; and that what was a reasonable time was a question of fact for the jury, depending on the particular circumstances of each case.—They cited *Mellish v. Rawdon* (9 Bing. 416), *Muilman v. D'Eguino* (2 H. Black. 565), *Shute v. Robins* (Moo. & M. 133). [*Parke*, B., referred to the passage in Pothier, cited in *Young v. Grote* (4 Bing. 258), and *Aude v. Dixon* (6 Exch. 869).]

Cur. adv. vult.

POLLOCK, C. B., (Nov. 23), said, that there ought to be a new trial, in order to ascertain whether, under the circumstances, there was any reasonable limitation in point of time for filling up the blank stamp.

Rule absolute.

Jan. 17.

SHAW, Appellant; BECK and Another, Respondents.

Upon the trial of an interpleader issue in a county court, for the purpose of trying the title to certain goods taken in execution, the plaintiff, in support of his title, gave in evidence a deed (which was valid upon the face of it) by which the execution debtor had assigned to him the goods in question; but the witness called to prove the execution of the deed was cross-examined by the defendants, with a view to shew that the transaction was fraudulent, and the deed was therefore void:

—*Held*, that the plaintiff was not bound to give evidence in the first instance to establish the validity of the deed, although called upon by the judge to do so, and although the nature of the defence appeared by the cross-examination of the attesting witness; and therefore, that the judge was wrong in refusing to receive evidence in reply, to rebut a case of fraud set up by the defendants to invalidate the deed.

THIS was an interpleader summons, which was tried at the County Court of Yorkshire held at Halifax, in which the appellant was the plaintiff, and the respondents were defendants. The plaintiff sought to recover certain goods mentioned in his particulars of claim, which had been taken by the defendants under an execution issued from the county court against one John Mellor, on the 17th of March, 1852.

At the trial, the plaintiff's attorney produced a deed (which was set out in the case). This deed, which was made on the 9th of March, 1852, between John Mellor (the judgment debtor of the defendants) and James Shaw (the plaintiff), after reciting that Mellor was entitled to the stock in trade, household furniture, and other effects, contained in his dwelling-house, set forth in the schedule annexed; and also that he was indebted to the plaintiff in 50*l.* 15*s.*, which he was unable to pay; and that the plaintiff had threatened legal proceedings against him: witness-

ed, that Mellor did thereby assign to the plaintiff the said stock in trade, household furniture, &c., and all books of account, debts, sums of money, and all documents for money, vouchers, and other documents, due, owing, or belonging to Mellor, subject to a proviso for redemption, upon payment of 50*l.* 15*s.* on the 9th of April, 1852, or at such earlier day as the plaintiff should appoint for the payment thereof, by notice in writing to that effect, to be given to Mellor, or left at his last place of abode in England, three clear days before the time appointed for such earlier day of payment; and that in the meantime interest should be paid on the principal sum. Then followed a covenant by Mellor to pay the principal sum and interest, with a proviso, enabling the plaintiff, upon default being made, to take possession of the said household furniture, and the other effects, and to reimburse himself the principal sum and interest, and the expenses of the sale, and to pay over the surplus to Mellor.

The only witness adduced on behalf of the plaintiff was the clerk to the plaintiff's attorney, the attesting witness to the deed; and he proved its execution on the 9th of March by Mellor. On cross-examination by the defendants' attorney, he stated that the deed was executed by Mellor about seven o'clock in the evening of the 9th of March, 1852, the plaintiff's attorney being absent; that Mellor declined to have the deed read to him before he executed it, urging his desire to return home without delay, as he had some distance to go, and that the witness told him the general effect of it; that the witness never saw Mellor at the offices of his employers until the evening in which he executed the deed; that the plaintiff did not execute the deed until the 18th of March; that the witness did not know who gave or took instructions for the deed, and had no knowledge of the consideration for the deed beyond what was stated in it.

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At the conclusion of this examination, the plaintiff's attorney stated that he should rest his case on the deed.

The judge then asked him whether he did not intend to call either the plaintiff or Mellor; and this he declined to do. The defendants' attorney thereupon contended, that the plaintiff had not made out his title to the goods; that the deed was without consideration; and that, if the plaintiff relied upon it, he must prove a valid consideration; and also that the cross-examination disclosed facts from which fraud would be inferred by a jury. Evidence was then adduced on the part of the defendants, for the purpose of shewing that the sale of the goods by the deed had been made without consideration, and was fraudulent upon the creditors. At the conclusion of the evidence, the plaintiff's attorney intimated his intention to adduce evidence to prove that the debt was due and owing to the plaintiff by Mellor for money lent, and that the transaction was *bonâ fide*. The judge, however, ruled that, as the plaintiff had declined to adduce evidence in proof of consideration when called upon to do so, and as the intention of the defendants' attorney to resist the claim on the ground of fraud appeared from the cross-examination of the plaintiff's witness, it was not competent for the plaintiff, without the consent of the defendants' attorney (which was not granted), to call any witnesses to rebut the defendants' case.

The judge took time to consider the effect of the evidence given; and he held that the deed was fraudulent and void, and decided the case in favour of the defendants.

The question for the opinion of the Court was, first, whether the judge was justified in deciding in favour of the defendants; secondly, whether he properly rejected the evidence offered on the part of the plaintiff, after the case for the defendants had terminated, to rebut fraud imputed, the plaintiff having declined to do so, when asked

by the judge, before the defendants had entered upon their case, whether he intended to do so or not.

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Hugh Hill for the appellant.—The judge improperly rejected the evidence tendered on the part of the plaintiff, for the purpose of answering the defendants' case. The plaintiff was not bound in the first instance to adduce evidence to anticipate the defence to his claim. The deed was *primâ facie* valid, and the onus of impeaching the transaction lay on the defendants: *Lewkner v. Freeman* (a). The plaintiff was, therefore, entitled to rest his *primâ facie* case upon the mere fact of the execution of the deed. Take the ordinary case of an action for the breach of a simple contract, where the defendant has pleaded never indebted and a plea of fraud; there the plaintiff is entitled to rest his case upon the proof of the contract, and the breach of it by the defendant, leaving it to the defendant, if he can, to establish the fraud he may rely upon. [*Parke, B.*—I think that the true rule upon this subject is that which was laid down by *Abbott, C. J.*, in *Browne v. Murray* (b). That was an action of libel, to which the defendant pleaded not guilty, and several special pleas of justification; and the Lord Chief Justice held that the plaintiff might, if he thought fit, content himself with the proof of the libel, and leave it to the defendant to make out his justification, and that the plaintiff might then, in reply, rebut the evidence produced by the defendant; but that if the plaintiff in the outset thought fit to call any evidence to repel the justification, then that he should go through *all* the evidence he proposed to give for that purpose, and that he ought not to be permitted to give further evidence in reply. I think, therefore, that the plaintiff has the option, either of relying upon his *primâ facie* case and leaving the defendant to answer it, and, upon the defendants' having given evi-

(a) Eq. Cas. Abr. 149.

(b) Ry. & Moo. 254.

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dence for that purpose, in reply giving evidence in answer to the defendants' case; or of going into the whole case in the first instance.] That rule is in accordance with the ordinary course of practice, and appears to be one of much convenience.

Atherton for the respondents.—The onus of proving consideration for the deed lay on the plaintiff. The case would have presented a different aspect, if the dispute as to the ownership of the goods had been between the parties to the instrument themselves; but here the question is between the grantee and the execution creditors. It appears on the face of the deed, that the grantor was indebted to the plaintiff, and that he was unable to pay the debt. [*Parke, B.*—The deed is a perfectly fair and valid instrument on the face of it; and the transfer, until impeached by extrinsic evidence, was good.] Then the rejection of the evidence tendered by the plaintiff was purely a matter within the discretion of the judge of the county court. The 118th section of the 9 & 10 Vict. c. 95, by which claims with respect to goods taken in execution are to be adjudicated upon in the county court, confers large powers upon the Judge, and the rejection of this evidence was a matter within his discretion: *Wright v. Wilcox* (a). The same view is taken in 2 Phillipps on Evidence, 475, 10th edit. [*Pollock, C. B.*—In that case the evidence was admitted, and the Court held that it was in the discretion of the Judge to admit it, and that at all events the learned Judge had not improperly exercised his discretion. *Alderson, B.*—Suppose a case of burglary, where the case for the prosecution is closed, the Judge might, and no doubt would, recall a witness to prove the parish in which the offence was committed, where that fact had been omitted.] The evidence which the plaintiff sought to give was merely con-

(a) 19 L. J., C. P., 333.

firmatory of his case. In *Jacobs v. Tarleton* (a), the plaintiff, who sued as indorsee of a bill of exchange, relied in the first instance upon a *primâ facie* case, by evidence of the indorser's handwriting; evidence was given for the defence (on a plea traversing the indorsement), to shew that the plaintiff was too poor to have given value for the bill, and had disclaimed all knowledge of it. It was held, that the plaintiff could not give evidence in reply, that he was able to give value and had actually discounted the bill, because such evidence was not in contradiction, but merely confirmatory of his *primâ facie* case.—He also referred to *Middleton v. Barned* (b).

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 BECK, Resp.

POLLOCK, C. B.—We are all agreed that there must be a new trial in this case, in order to give the learned judge of the county court an opportunity of admitting the evidence which was tendered by the plaintiff in reply to the defence founded upon fraud, set up in answer to the deed. I take it to be a well-established rule of practice, that, at a trial at *Nisi Prius*, many matters, having reference to the conduct of the cause, are in the discretion of the Judge. Many cases might be suggested. Suppose, on a trial for burglary, the case for the prosecution were closed, and it were objected that no proof had been given that the house was situate in the parish laid in the indictment, the Judge would, no doubt, allow that fact to be established; but he would not be bound to receive the evidence to supply the omission. I quite agree with the decision in *Wilcox v. Wilcox*. There, a *primâ facie* case having been established by the plaintiff, the defendant introduced an entirely new element into it; and, although the effect of the evidence in reply, to a certain extent, strengthened the case originally made, yet it rebutted the new

(a) 11 Q. B. 421.

(b) 4 Exch. 241.

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SHAW, App.;
BACK, Resp.;

matter adduced by the defendant; and it was clearly in the discretion of the Judge to admit it, and he did so. But there are cases in which, I think, the plaintiff is entitled, almost as a matter of right, to give evidence in reply. Where there are several issues, some of which are upon the plaintiff and some upon the defendant, the plaintiff may begin by proving those only which are upon him, leaving it to the defendant to give evidence in support of those issues upon which he intends to rely; and the plaintiff may then rebut the facts which the defendant has adduced in support of his defence. But it is urged that, in the present case, there are no pleadings, and that the plaintiff's case is resolved into a single proposition, with which he must deal at once, and that he was bound to go into the whole of his case upon receiving the intimation of the defence, and that such an expression of opinion is to be found in the case cited in the Court of Common Pleas. But I think that the plaintiff was entitled to rely upon a *prima facie* case, by proving the execution of the deed, for that was all which it was incumbent upon him in the first instance to establish. He had a perfect right to do so, and to leave it to the defendant to impeach the consideration, and he was entitled in reply to rebut the defendant's evidence. The same principle of practice is recognised in the action of ejectment, in which the question depends upon the title of the disputed property: the plaintiff may prove a *prima facie* case; the defendant may then set up an entirely new case; the plaintiff may then in reply set up another case, and so on: *Doe d. Sturt v. Mobbs* (a), *Rowe v. Brenton* (b), are authorities in support of this proposition. I therefore think that the plaintiff was entitled to rest upon his *prima facie* case, and that the judge was wrong in refusing to allow him to give the evidence which he tendered in reply to the de-

(a) Car. & M. 1.

(b) 8 B. & C. 737.

fendants' case. I am therefore of opinion that there ought to be a new trial.

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PARKE, B.—I am of the same opinion. I will not say that this was not a matter in the discretion of the judge; but I think that he ought to have exercised that discretion in accordance with the rule of practice in these matters, and that according to that rule he ought to have admitted the evidence offered in reply. And I take it, that the true and reasonable rule is that which was laid down by *Abbott*, C. J., in the case of *Broune v. Murray*. Before that case, Lord *Ellenborough*, C. J., in *Rees v. Smith* (a), had ruled, that where, by the pleadings or by notice, the plaintiff's counsel knows what the defence will be, he is bound to go into the whole case in chief, and cannot rest upon a *prima facie* case; and he went so far as to hold that the rule applied even in the case where the defence appeared upon the cross-examination of the plaintiff's witness. But *Abbott*, C. J., laid down what appears to me to be a more reasonable rule, by holding that the defendant was bound to prove his plea, and that the plaintiff might answer it by additional evidence. *Broune v. Murray* was an action of libel, and the defendant pleaded not guilty, and a plea of justification; and *Abbott*, C. J., ruled that it was optional with the plaintiff either to open his whole case in answer to that which, as it appeared by the pleadings, the defendant intended to set up, or to rely in the first instance upon the proof of the libel alone. That rule has constantly been acted upon in cases in which there are special pleadings raising several issues. If this had been an action of trespass for taking these goods, and there had been special pleadings, and the transfer had been impeached on the ground of fraud, the plaintiff would have had merely to shew his title to the goods by proof of the exe-

(a) 2 Stark. 31.

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SHAW, App.;
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cution of the deed, and the defendant would have been compelled to prove the fraud. In this case there are no pleadings; the bailiff has taken these goods in execution, and the plaintiff claims them as his by virtue of the deed which he gives in evidence; and the defendants, who seek to set that instrument aside as fraudulent, must establish fraud, upon the universal principle that every transaction in the first instance is assumed to be valid, and the proof of fraud lies upon the person by whom it is imputed. The transfer of property by deed is good and valid, without proof of consideration; and therefore the plaintiff, by proof of the deed, established a *prima facie* case, and the defendants were bound to shew that it was fraudulent, and the plaintiff was clearly entitled to call any amount of evidence to disprove the fraud. I therefore think that the judge was wrong in rejecting the evidence, and that there ought to be a new trial. It is unnecessary to say anything upon the other point in the case.

ALDERSON, B., and MARTIN, B., concurred.

New trial, with costs.

1853.

JOSEPH WATERS, EDWIN WATERS, and GEORGE RIGG v.
WILLIAM TOWERS and JOSEPH SHIRLEY.

Jan. 13.

ASSUMPSIT by the plaintiffs against the defendants, on their breach of contract in not fitting up certain mill-gearing in a workman-like manner, and completing the work within a reasonable time.—The declaration alleged as special damage, that, by reason of the premises, a certain engine and mill of the plaintiffs became and were of much less use and value, &c., and the plaintiffs lost the means of using the said mill and their capital for a long time, to wit, six months, in so beneficial a manner as they otherwise would have done, and thereby also were prevented, during all that time, from carrying on the business of bobbin-makers; and also, by reason of the premises, the plaintiffs, Joseph Waters and Edwin Waters, who had contracted with the plaintiffs, Joseph Waters, Edwin Waters, and George Rigg, to be supplied by them with a great quantity, to wit, 1200 gross of bobbins per week, to be by the said Joseph Waters and Edwin Waters used in their separate business, could not be supplied for divers, to wit, twenty weeks, and were thereby put to great inconvenience, damage, and loss; and the said Joseph Waters, Edwin Waters, and George Rigg lost the profit which would have accrued to them from so supplying the said Joseph Waters and Edwin Waters with the said quantity of bobbins for the said twenty weeks; and by reason of the premises also, divers, to wit, five apprentices of the plaintiffs were, during all the time last aforesaid, useless and unproductive to the plaintiffs, and the plaintiffs were compelled, at their own costs and charges, amounting, to wit, to 100*l.*, to maintain the said apprentices, without receiving any adequate return for such maintenance, &c.

In an action by three plaintiffs for a breach of contract in not completing certain works, whereby they were prevented from fulfilling a contract made by them with another firm consisting of two of themselves, the plaintiffs were held entitled to recover as special damage the loss of profit on their contract, although it could not be enforced at law, owing to the community of the parties, and was void by the Statute of Frauds.

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The defendants pleaded non assumpserunt, with other pleas.

At the trial, before *Wightman*, J., at the Cumberland Summer Assizes, 1852, the defendants' breach of contract was proved; and that in consequence the plaintiffs, Joseph Waters, Edwin Waters, and George Rigg, who carried on business as bobbin-spinners in Cumberland, were unable to fulfil a verbal contract made with the two plaintiffs, Joseph Waters and Edwin Waters, who carried on a separate business in Manchester, for the supply of the bobbins as alleged in the declaration. It was objected, on behalf of the defendants, that the loss of profit on the transaction was too remote a consequence to be the subject of special damage, and even if it were not, still the plaintiffs could not recover any damage in respect of it, by reason of the community of the parties; and also because the contract was invalid by the 17th section of the Statute of Frauds, 29 Car. 2, c. 3, the value of the goods agreed to be supplied being above 10*l*. A verdict was entered for 14*l*., the amount of damage arising from the apprentices being unemployed; and leave was reserved to the plaintiffs to move to increase the amount by 113*l*., the estimated profit which would have accrued to the plaintiffs, if their contract for the supply of the bobbins had been fulfilled.

Atherton, in last Michaelmas Term, obtained a rule nisi accordingly; against which

Hugh Hill now shewed cause.—The loss of profit to the plaintiffs from their inability to supply the bobbins was not a necessary consequence of the defendants' breach of contract, but a mere contingent damage. In *Story on Agency*, s. 220, it is said, "If an agent, having funds in his hands, should improperly neglect to ship goods by a particular ship, according to the orders of his principal, and the ship should duly arrive, and if the goods had been on

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board the principal might, by future reshipments and speculations, have made great profits thereon, the agent will not be bound to pay for the loss of such possible profits, for it is a mere contingent damage, or an accidental mischief." The true principle is laid down in Kent's Commentaries, Vol. 2, p. 480, note, 4th edit., where, after reference to the authorities, it is said, "Damages for breaches of contract are only those which are incidental to, and directly caused by, the breach, and may reasonably be supposed to have entered into the contemplation of the parties, and not speculative profits, or accidental or consequential losses." Moreover, this contract was not binding on the parties, inasmuch as no action at law could be maintained by the three plaintiffs against two of themselves; also, because the contract was void by the Statute of Frauds.—[*Alderson*, B.—If a person undertakes to make a certain article for another, and to deliver it to him on a particular day, but fails to do so until a year afterwards, it would be most unreasonable that the latter should not recover any damage because the contract was not in writing. The existence of a contract is evidence of the probable amount of loss sustained. Suppose the plaintiffs had said, "We should have made such and such a contract if the defendants had performed theirs," and the jury believed that the plaintiffs would have done so, that would surely have been evidence of the amount of loss occasioned by the defendants' breach of contract.]

Atherton and *Edward James* appeared to support the rule, but were not called upon.

PER CURIAM (a).—The rule must be absolute.

Rule absolute.

(a) *Pollock*, C. B., *Alderson*, B., and *Martin*, B.

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Jan. 19.

PARKER v. WATSON.

To an action on a joint and several bond in the penal sum of 2800*l.*, given by the defendant, J. O., and M. N., conditioned for the payment of 1400*l.*, the defendant pleaded—

First, that the sum mentioned in the bond was secured by a warrant of attorney of even date therewith, upon which judgment was to be forthwith entered up, given by J. O. to the plaintiff; and that J. O., after the day conditioned for payment of the principal sum, paid the same, with interest, to the plaintiff.

—Secondly, that plaintiff sued J. O. for the detention of the monies in the declaration

mentioned in respect of the bond, that he obtained judgment, and took in execution goods of J. O. to the amount of 1417*l.*

Thirdly, that, at the time of entering into the bond, J. O., and the defendant and M. N. as his sureties, executed a warrant of attorney, upon which the plaintiff was authorised to enter up judgment forthwith for 2800*l.*, for securing the payment of the sum of 1400*l.*, but that execution should not issue except in case of default being made; that plaintiff afterwards sued J. O. for the said debt of 2800*l.*; that J. O. became bankrupt; that plaintiff omitted to file the warrant of attorney as required by 3 Geo. 4, c. 39; that certain goods of J. O. were taken in execution under the judgment so obtained; and that thereby the plaintiff suspended his remedy against the principal and discharged the defendant, the surety.

Replication to second plea—That, by reason of the omission to file the warrant of attorney, the plaintiff was compelled to refund to the assignees of J. O. the proceeds of the execution. Similar replications to the first and third pleas.

Held, that the facts disclosed by the pleadings afforded no defence at law to the action.

DEBT on a bond for 2800*l.*, dated the 12th of February, 1851.

The defendant, in his first plea, set out the bond and condition on oyer, by which it appeared to be a joint and several bond, given by one J. Oyston, the defendant, and one M. Neesham, conditioned for the payment of 1400*l.* on the 12th of August then next ensuing, with interest at 5*l.* per cent., with a memorandum that the said sum of 1400*l.*, secured by the bond, was the same sum as that mentioned and further secured by a certain warrant of attorney of the same date, given by the said J. Oyston to the plaintiff, for securing payment of the said sum of 1400*l.* and interest, upon which warrant of attorney judgment was intended to be entered up in the Court of Queen's Bench. The plea then proceeded to allege that the said J. Oyston did, after the said 12th of August, and before the commencement of the suit, pay to the plaintiff the said sum of 1400*l.*, together with all interest due thereon.

The defendant pleaded, secondly (in substance), that the plaintiff, on the 21st of February, 1851, sued the said J. Oyston in an action of debt for the detention of the monies in the declaration mentioned in respect of the bond;

that the plaintiff obtained judgment in that action; that he sued out a writ of *fi. fa.*, which was indorsed with a direction to the sheriff to levy 1417*l.* 17*s.* 8*d.*, with interest &c., poundage, fees &c.; and that, under the writ, the sheriff took in execution divers goods of the said J. Oyston, to the amount of the money indorsed on the said writ, and paid and satisfied to the plaintiff his debt, damages, and interest.

The defendant pleaded, thirdly (in substance), that, at the time of entering into the bond, the said J. Oyston, and the defendant and M. Neesham as his sureties, executed a warrant of attorney to the plaintiff, authorising judgment to be entered up forthwith for the sum of 2800*l.*, for securing the payment of the said sum of 1400*l.* with interest, but that execution should not issue upon the judgment, unless default in payment should be made on the day mentioned or on demand, in which case the plaintiff was to be at liberty to issue execution for the whole amount of 1400*l.* The plea then proceeded to state, that the defendant executed the bond merely as Oyston's surety; that afterwards, in pursuance of the warrant of attorney, the plaintiff sued Oyston for the detention of the said sum of 2800*l.*, that he recovered judgment, that he sued out a writ of *fi. fa.* upon that judgment; and further, that, at the time of the giving of the warrant of attorney, and the levying of execution afterwards mentioned, Oyston was a trader, and liable to become a bankrupt; and that the plaintiff, well knowing the premises, and disregarding the statutes in that case &c., of his own proper omission and negligence, without the privity, consent, or knowledge of the defendant, omitted to file the warrant of attorney, together with an affidavit of the time of its execution, in the Court of Queen's Bench, within twenty-one days, in pursuance of the 3 Geo. 4, c. 39; that afterwards the writ of *fi. fa.* was delivered to the sheriff, indorsed with a direction to levy 1417*l.* 17*s.* 8*d.*, together with interest, &c.; that the

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sheriff took Oyston's goods in execution to that amount, and that he thereout paid over to the plaintiff the same in satisfaction of his debt, damages, and interest, which the plaintiff accepted; by reason whereof the plaintiff thereby, without the consent, privity, or knowledge of the defendant, suspended the plaintiff's right of action against Oyston for the recovery of the debt &c., and precluded himself and the defendant respectively from bringing any other action, or seeking any other remedy in that behalf against Oyston for a long space of time, to wit, for a week; and that, by reason of the premises, the said debt in the said writing obligatory mentioned, so far as regards the defendant in this action, then became wholly extinguished in law &c.

Demurrer to the second and third pleas, and joinder.

The plaintiff also replied to the second plea (in substance), that the judgment in that plea mentioned was entered up solely under the authority of the warrant of attorney; that Oyston was a trader and liable to become a bankrupt; that the warrant of attorney was not filed in the Court of Queen's Bench (as set forth in the plea); that Oyston, after the levying of the money, became a bankrupt; that certain of his creditors thereupon duly filed a petition for adjudication in the Leeds District Court of Bankruptcy; that assignees were duly appointed, &c. (stating the proceedings), whereby the said warrant of attorney was by the statute wholly fraudulent, null, and void, as against the said assignees; by reason whereof, and after the levy and payment to the plaintiff, he was obliged to pay back to the assignees the said debt, damages, and interest, &c., whereby the said payment to the plaintiff became of no value to him.

Demurrer, and joinder.

The plaintiff replied to the first plea, in substance, that the payment therein mentioned was the same payment as that in the second plea; and that, by reason of the re-

turn of the levy as set forth in the replication to the second plea, such payment became wholly valueless to the plaintiff.

The plaintiff also replied to the third plea, in substance as in the replication to the second plea.—Demurrer, and joinder.

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Hugh Hill, for the plaintiff.—The second and third pleas afford no defence to the action, and the replications respectively afford good answers to the three first pleas.

First, as to the replication to the first plea.—A levy under an execution, after the day appointed for payment by the condition of a bond, does not amount to payment post diem, within the true meaning of the 4 & 5 Anne, c. 16. In fact, it was no payment by the defendant, and could not operate to discharge him as co-obligee of the bond. And moreover, the replication shews that the fruits of the execution became utterly worthless to the plaintiff.

Secondly, for the same reasons, the second plea is bad in substance, as it merely sets forth an execution against the goods of the co-obligee of the bond; which does not amount to a payment within the statute of Anne.

Thirdly, the third plea is bad. The plea states, that the defendant executed a warrant of attorney of even date with the bond, for the same sum of money, as co-surety only with a third party for Oyston as principal; and that the plaintiff, by reason of his neglect to file the warrant of attorney as required by the 3 Geo. 4, c. 39 (a), suspended his remedy against the principal, and thereby, by giving him time and having altered the position of the sureties, has discharged them from all liability upon the bond. But it is not open to the defendant to allege that

(a) See *Acraman v. Herniman*, 20 L. J., Q. B., 355.

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he is merely a surety. In *Rees v. Berrington* (a), Lord Loughborough, C. J., said, "that where two are bound jointly and severally, the surety cannot aver by pleading that he is bound as surety." But even upon the assumption that the defendant could be treated as a co-surety to the bond, the suspension by the obligee of his remedy against the principal is no answer to an action at law on the bond. [Parke, B.—That is established by *Davey v. Prendergrass* (b).] The defendant's remedy is by application to a Court of equity.—He was then stopped by the Court; who called upon

R. Hall contra.—The pleas objected to are good, and the replications afford no answer to them. First, the pleadings shew that there has been a payment de facto, and they disclose circumstances which amount to payment post diem within the statute of Anne. In *Thorne v. Smith* (c) it was held, that the payment of a promissory note, which had been given by a third party to the plaintiff in satisfaction of a prior note, was well pleaded as payment to an action upon the original note.

Secondly, it appears upon these pleadings that the defendant was a mere surety. In *Ashbee v. Pidduck* (d) that fact did not appear. [Parke, B.—That does not appear to be the fact here. The warrant of attorney, which was executed contemporaneously with the bond, as appears by the memorandum set forth in one of the pleas, was given as a collateral security; but it was not intended thereby to merge in it the debt for which the bond was given. That debt has never been paid.] The plaintiff suspended his remedy against the principal debtor, and, although the suspension be but for a moment, still it acts as a suspension of the creditor's remedy for ever. In *Capel v. Butler* (e) it was held, that if, by the neglect of the credi-

(a) 2 Ves. jun. 540.
 (b) 5 B. & Ald. 187.
 (c) 10 C. B. 659.

(d) 1 M. & W. 564.
 (e) 2 Sim. & S. 457.

tor, the benefit of some of the securities for the debt is lost, the surety is pro tanto discharged. [*Parke, B.—Davey v. Prendergrass* is a decision at law to the contrary.]

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H. Hill was not called upon to reply.

PARKE, B.—I am of opinion that the plaintiff is entitled to judgment. The case contains many pleas, to which there are demurrers and replications, and to those replications there are demurrers also; and although the pleadings are rather more complicated than they used to be under the old system, yet the questions raised by the case may be disposed of without much difficulty. I am of opinion that neither of the pleas to which the plaintiff has demurred can be supported in point of law; and that, if they could, they are completely answered by the replications. Taking them in their order, the first plea sets out on oyer the bond and condition, and the memorandum indorsed upon it. Now this memorandum is to be taken as forming part of the condition of the bond. The plea then goes on to allege that there was a payment post diem of the principal sum, with all interest due thereon. But the replication shews that the plaintiff received no value from the levy under the execution, the warrant of attorney having been set aside by the assignees of Oyston. This cannot therefore be taken as payment within the statute of Anne. Payment, within the meaning of that statute, must be payment of the principal sum, with interest, by the debtor, or by his agent on his behalf, to the creditor, after the day fixed for payment in the condition of the bond. That statute enabled the debtor to make the payment after the day instead of upon it. Here there was no payment whatever by the defendant. This case therefore differs from that of *Thorne v. Smith*, which was an action upon a promissory note, where it appeared that another promissory note had been received by the plaintiff from a third party, by an arrangement between the plaintiff and the defendant

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in satisfaction of the first note, and that the note so given in satisfaction had been paid; and it was there held, and very properly so, that this amounted to payment of the first note. That was in fact a payment by a third party as the agent of the defendant. But that is not the case here, neither was this a payment in money, and consequently it cannot be treated as a payment within the statute of Anne. The replication to the first plea is therefore good. Then, as to the second plea, the warrant of attorney, which is given as a collateral security, is not to be taken as meaning that the sum of money which it is given to secure is the identical debt mentioned in the bond. In contemplation of law they are different. Then comes the question, whether the levy under an execution of the sum of 1400*l.*, is an answer to an action at law upon a bond, with a penalty of 2800*l.* This is no answer in law to an action for the penalty. It might afford a ground for an application to the Court for equitable relief, by analogy to the statute of Anne, by reason of the plaintiff having received satisfaction for the amount of the debt due to him. The plea therefore affords no answer to this action, which is brought to recover the penalty payable by the bond. Then as to the replication. The plea contains the defence already stated; the replication shews that the defendant's remedy is in equity. The case of *Davey v. Prendergrass* decides that, in an action on a bond against a surety, time given to the principal by a parol agreement is no defence at law. The defendant in such case must seek his remedy by application to a Court of equity. As to the third plea, that is the same in effect as the second, and enough has been already said upon this point. The result is, that the plaintiff is entitled to judgment.

ALDERSON, B., and MARTIN, B., concurred (a).

Judgment for the plaintiff.

(a) *Pollock*, C. B., had left the Court.

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HESLOP v. BAKER and Others, Assignees of J. ATKINSON, a Bankrupt. Jan. 12.

TROVER for goods and chattels. Pleas, not guilty and not possessed.

This cause was tried twice. At the first trial, before *Cresswell, J.*, at the Newcastle Spring Assizes, 1851, it appeared that the plaintiff claimed the property in question under an assignment, made several years before the commencement of the suit by one James Atkinson, for alleged advances. The defendants were the assignees of Atkinson, who had committed an act of bankruptcy towards the end of August, 1850, by leaving his dwelling-house and place of business, and going to America. Up to that time the property had remained in his possession as apparent owner. On the 4th of September, after the departure of the bankrupt, the plaintiff, who at that time knew of the act of bankruptcy, took possession of the property. On the 9th of September, Atkinson was adjudged a bankrupt, and a few days afterwards the defendants were duly appointed his assignees, and on the 7th of October they took possession of the property.

Upon this state of facts it was contended, that the property did not vest in the assignees under the 12 & 13 Vict. c. 106, but that they could only deal with it by means of an order to be made under the 125th section of that Act. The learned Judge overruled the objection, and the defendants obtained a verdict. A rule nisi was subsequently obtained for a new trial, on the ground of misdirection;

By the order which is required by the 125th section of the 12 & 13 Vict. c. 106, to vest the property in goods which are in the order and disposition of the bankrupt as reputed owner, in the assignees or vendee of the goods, their title has relation back to the act of bankruptcy, in the same way as the title of the assignees has by the general assignment.

An order made by the Court of Bankruptcy stated, that "the said J. A. (the bankrupt) had, at the time he became bankrupt, by the consent of R. H." (the owner), "who then claimed and still claims to be true owner thereof, in his the said J. A.'s possession, order, and disposition, divers goods," &c. i. e.

the goods in question:—*Held*, that the order was good, although it did not state positively that R. H. was, in fact, the true owner of the goods.

In an action of trover by the owner of the goods against the assignees of the bankrupt, the defence, that the goods were at the time of the bankruptcy in the order and disposition of the bankrupt with the consent of the true owner, and that the title to the goods vested in the assignees by virtue of an order made by the Court of Bankruptcy, is admissible under a plea of not possessed, although the order was applied for and made after action brought.

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and that rule was afterwards made absolute, the Court being of opinion that such order was necessary (a). The defendants accordingly obtained an order (b); and the cause

(a) 6 Exch. 740.

(b) The following is the order in question; and, as a form may be useful, it is set out at length:—

“The Bankrupt Law Consolidation Act, 1849.

“In the Court of Bankruptcy for Newcastle-upon-Tyne District,

“9th Dec., 1851.

“In the Matter of James Atkinson, a Bankrupt:—

“Whereas heretofore, to wit, on the 30th of August, A.D. 1850, the above-named J. Atkinson was a tavern-keeper, dealer, and chapman, and a trader within and subject to The Bankrupt Law Consolidation Act, 1849; and, as such trader, was then indebted to J. Hall in the sum of 50*l.* and upwards for a true and just debt; and thereupon the said J. Atkinson, so being such trader and being so indebted, then, to wit, on the day and year aforesaid, became and was a bankrupt within the true intent and meaning of the said Act of Parliament; and thereupon afterwards, to wit, on the 9th of September, in the year aforesaid, the said J. Hall duly presented a petition for adjudication of bankruptcy against the said J. Atkinson to the Court of Bankruptcy for the Newcastle-upon-Tyne district; which said Court then was a District Court of Bankruptcy held at Newcastle-upon-Tyne, the same being the place at which the said Court

had before been duly, and according to the form of the statute in such case made, that is to say, the statute made and passed in the fifth and sixth years of Victoria, intitled ‘An Act for the Amendment of the Law of Bankruptcy,’ directed to be held by her Majesty, with the advice of her Privy Council, in and for a certain district, duly, and according to the form of the said last-mentioned statute, appointed and directed by her said Majesty, with the like advice, to and for the said Court before me the undersigned Nathaniel Ellison, Esq., Barrister-at-Law, of not less than seven years standing at the bar at the time of my appointment, and duly, and according to the form of the said statute, appointed by commission under the Great Seal to be a commissioner of the Court of Bankruptcy, to act in the prosecution of fiats in bankruptcy in the county, and to act as such commissioner in the said District Court at the said place in and for the said district; which said petition then was in the form specified in the Schedule (M.) to the Bankrupt Law Consolidation Act, 1849, annexed; and the truth thereof was then verified by an affidavit of the said J. Hall in the form specified in the Schedule (N.) to the same Act of Parliament annexed, and was then duly filed of record in the

was tried before Lord *Campbell*, C. J., at the last Newcastle Assizes, when the same facts appeared. It was objected

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said District Court of Bankruptcy, so holden as aforesaid, within the district and jurisdiction of which same Court the said J. Atkinson had resided and carried on his business for six calendar months next immediately preceding the time of the filing of the said petition; and thereupon afterwards, to wit, on the said 9th of September, A. D. 1850, upon proof of the said debt so due to the said J. Hall, and of the said trading and act of bankruptcy of the said J. Atkinson, the said Court of Bankruptcy, so holden as aforesaid at Newcastle-upon-Tyne aforesaid, and within the district of the said Court, before me, so being such commissioner as aforesaid, duly adjudged the said J. Atkinson to be a bankrupt within the true intent and meaning of the said Bankrupt Law Consolidation Act, 1849. And forthwith, after the said adjudication, to wit, on the day and year last aforesaid, the said Court, so holden as aforesaid, duly, and according to the form of the same Act of Parliament, appointed Thomas Baker, then and still being an official assignee, duly, and according to the form of the statute in such case made, chosen and appointed by the Lord Chancellor to act as official assignee in bankruptcies prosecuted in the country and to act as such official assignee, in bankruptcies prosecuted in the

said District Court of Bankruptcy, to be an assignee of the estate and effects of the said James Atkinson, to act with the assignee or assignees to be chosen by the creditors of the said J. Atkinson. And afterwards, to wit, on the day and year last aforesaid, a duplicate of the said adjudication was duly, and according to the form of the Bankrupt Law Consolidation Act, 1849, served on the said J. Atkinson by then leaving the same at his last known place of abode. And forthwith, after the expiration of seven days from the service of the said duplicate (to wit) on the 20th day of September, in the said year 1850, no cause having been shewn to the satisfaction of the said Court for the annulling the said adjudication, the said Court, so holden as aforesaid, caused notice of the said adjudication to be given in the London Gazette, published on the said last-mentioned day; and thereby appointed two public sittings of the said Court for the said J. Atkinson to surrender and conform: the first of which sittings was thereby appointed to be held at one of the clock in the afternoon, on the 26th of September, in the year aforesaid, at the said place where the District Court of Bankruptcy was usually held at Newcastle-upon-Tyne aforesaid; and the last of which sittings was thereby ap-

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on the part of the plaintiff, first, that the order had no relation back to the act of bankruptcy; secondly, that the

pointed to be held at the aforesaid place, at one of the clock in the afternoon on the 29th of October, in the year aforesaid, the same being not less than thirty and not exceeding sixty days from the said advertisement, and was the day limited for such surrender; and the said first sitting, so appointed by the said Court under the said bankruptcy, was held on the said 26th of September, in the year aforesaid, at the said Court of Bankruptcy, then being held at Newcastle-upon-Tyne aforesaid, in and for the district and jurisdiction of the said Court, before William Sydney Gibson, then being the registrar of the said District Court, duly appointed under and according to the provisions of the said statute, intituled An Act for the Amendment of the Law of Bankruptcy, and duly authorised, as such registrar, to exercise on the said last-mentioned day the powers given in that behalf by the Bankrupt Law Consolidation Act, 1849, and then acting according to the said statute for and as the deputy of me, the said Commissioner, during my absence in vacation from the said District Court, and having and exercising power to hold such sitting, and to do the acts next hereinafter mentioned in that behalf. And at the said sitting so held, J. Hall and R. A. Johnson were chosen by the major part of the creditors of

the said J. Atkinson, who had proved debts against him under the said bankruptcy to the amount of 10*l.* and upwards, to be the assignees of the estate and effects of the said J. Atkinson. And the said Court of Bankruptcy, so holden as aforesaid, then approved of, ratified, and confirmed the said choice, and then appointed the said J. Hall and R. A. Johnson to be assignees of the said estate and effects accordingly; and the said J. Hall and R. A. Johnson then accepted the said trust and appointment.

“And whereas the said Court of Bankruptcy, so holden as aforesaid at Newcastle-upon-Tyne aforesaid, in and for the district and jurisdiction of the said Court, before me the said Nathaniel Ellison, so being such commissioner as aforesaid, has been duly informed by and on behalf of the said T. Baker, J. Hall, and R. A. Johnson, so being and as such assignees as aforesaid, that the said J. Atkinson had, at the time he became bankrupt, by the consent and permission of Robert Heslop, who then claimed and still claims to be true owner thereof, in his the said J. Atkinson's possession, order, and disposition, divers goods and chattels, (to wit), the goods and chattels hereinafter set forth, whereof the said J. Atkinson then was reputed owner, and which, by the Bankrupt Law

order was void upon the face of it; and thirdly, that the defence was not admissible under the plea of "not pos-

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Consolidation Act, 1849, the said Court ought to order to be sold and disposed of for the benefit of the creditors of the said J. Atkinson; And the said Court, so holden as aforesaid, has duly summoned the said R. Heslop to appear before the said Court, to be examined touching his said claim, and to shew cause why the said Court should not order the said goods and chattels to be so sold and disposed of.

Now, upon the application of the said T. Baker, J. Hall, and R. A. Johnson, so being and as such assignees as aforesaid, by J. M. Cooper their attorney, and upon hearing them, and also hearing the said R. Heslop by J. B. Simpson his attorney, he having by his said attorney duly, and in pursuance of the said summons, appeared before the said Court to shew cause against the present order, and upon reading the examination of the said R. Heslop before me taken, and it having been duly proved to the satisfaction of the Court holden as aforesaid, that the said J. Atkinson committed an act of bankruptcy on the 30th of August, 1850, and then became bankrupt; and that the said R. Heslop had notice thereof in the morning of the 3rd of September, 1850; and that the said J. Atkinson, on the said 30th of August, the time when he became bankrupt as aforesaid, had, by the consent and permission of the said R.

Heslop, who then claimed, and still claims to be the true owner thereof, in his the said J. Atkinson's possession, order, and disposition, the goods and chattels hereinafter mentioned, whereof he the said J. Atkinson was reputed owner, and no other person than him the said R. Heslop having made any claim to be true owner thereof: The said Court, so holden as aforesaid at Newcastle-upon-Tyne aforesaid, within the district and jurisdiction of the said Court before me, the said Nathaniel Ellison, so being such commissioner as aforesaid, upon consideration of the matters aforesaid, doth hereby find and adjudge that the said J. Atkinson committed an act of bankruptcy, and became bankrupt, on the 30th of August, 1850; and that, at the time when he became bankrupt, he had, by the consent and permission of the said R. Heslop, who then claimed and still claims to be the true owner thereof, in his the said J. Atkinson's possession, order, and disposition, the following goods, that is to say, [describing the goods],—whereof he the said J. Atkinson was reputed owner; And the said Court, so holden as aforesaid, doth hereby, according to the said Bankrupt Law Consolidation Act, 1849, and in exercise of the power thereby in that behalf given, order the said goods and chattels, which the said J. Atkinson, at

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essed." The learned Judge directed a verdict to be entered for the defendants, reserving leave to the plaintiff to move to set that verdict aside and to enter a verdict for the plaintiff, with 250*l.* damages.

In Michaelmas Term last, *Bliss* obtained a rule nisi accordingly; against which

Watson, Hugh Hill, and J. A. Russell now shewed cause.—First, the principal question, whether the order has relation back to the act of bankruptcy, so as to vest the goods in the assignees at a time dating from that act, has been already decided by this Court in the present case. In answer to the objection that, if the order were held to be necessary, the statute might be rendered nugatory, inasmuch as either the bankrupt or the owner of the goods would have the power of disposing of the goods in the interval between the act of bankruptcy and the obtaining of the order, the Court said, "there is no absurdity, or inconsistency, or inconvenience, in holding that an

the time when he became bankrupt, by the consent and permission of the said R. Heslop as owner thereof, had in his the said J. Atkinson's possession, order, or disposition, or whereof he the said J. Atkinson was reputed owner as aforesaid, to be sold and disposed of by the said T. Baker, J. Hall, and R. A. Johnson, so being and as such assignees as aforesaid, for the benefit of the creditors of the said J. Atkinson under the said bankruptcy; and also so far as the said Court can and lawfully may, but not further or otherwise, the said Court doth hereby order and direct that the said goods and chattels hereinbefore speci-

fied shall be vested in the said T. Baker, J. Hall, and R. A. Johnson as such assignees as aforesaid, to be sold and disposed of as aforesaid. And the said Court doth hereby ratify and confirm all acts heretofore done by the said assignees in and about the seizure, sale, and disposition of the said goods and chattels hereinbefore specified, as far as such seizure, sale, and disposition have been well and properly conducted, and doth order and direct that the proceeds of such goods and chattels so sold and disposed of shall be held and applied by the said assignees for the benefit of the creditors of the said J. Atkinson under the said bankruptcy."

order is necessary in such a case; when given, the title of the vendee if the goods are sold, of the assignees if the order is to vest the goods in them, will relate to the act of bankruptcy, in the same way that the title of the assignees does by the general assignment, for all will be sold or assigned which the bankrupt had at the time he became bankrupt." The whole system of the bankrupt laws is based upon this doctrine of relation. The defendants relied upon this expression of opinion by this Court at the trial; and if they had thought that it was probable that the Court would overrule their own decision, the defendants would have tendered a bill of exceptions. If the order has this relation to the act of bankruptcy, the precise time at which it is obtained is immaterial. Here it was made after action brought. Many authorities might be cited to shew that ratifications may legalise past acts, although the ratification take place after action brought: *Whitehead v. Taylor* (a), *Buron v. Denman* (b), *Fitchet v. Adams* (c). [*Parke, B.—Hull v. Pickersgill* (d) is a strong case of that description: there the house of the plaintiff, who was an uncertificated bankrupt, was broken into, and his goods, which he had acquired subsequently to his bankruptcy, were taken by the defendants, who had become his creditors since the bankruptcy, and did not know who were the assignees under the bankruptcy. The plaintiff sued the defendants in trespass, and after a rule for plea, they obtained a surrender of the assignees' interest in the effects seized, and it was there held that this was a ratification of the seizure, and that the plaintiff could not recover.] In *Foster v. Bates* (e), the doctrine of relation was much considered. It was contended on the part of the plaintiff, on moving this rule, that this doc-

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(a) 10 A. & E. 210.

(b) 2 Exch. 167.

(c) 2 Str. 1128.

(d) 1 Brod. & Bing. 282.

(e) 12 M. & W. 226.

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trine of relation is a mere legal fiction: *Butler's case*, 3 Rep. 29 b; and that it ought not to be applied in such a manner as to work a hardship, by disturbing and rendering invalid transactions which were complete and valid. But there is no such hardship here, as the plaintiff knew the fact of the bankruptcy of the assignee of the goods. It was obligatory upon the Commissioner to make the order: *M'Dougal v. Paterson* (a), *Alderman Backwell's case* (b). [*Parke, B.*—The power to make the order is not disputed.]

Secondly, the order is in itself unobjectionable. It will be urged, that the order merely states that the plaintiff "claims" to be the true owner, instead of positively averring that he was the true owner at that time; and further, that the order itself ought to have been a conveyance or transfer by sale of the property. The first of these objections is purely technical, and the last is of no weight, as the statute does not require a sale to transfer the title, but merely an order of the Court of Bankruptcy.

Thirdly, assuming the order to be good, and to have a retrospective effect, the defendants are entitled to succeed upon the plea of not possessed. The plaintiff's title was a defeasible one, and was defeated by the order. The following cases shew that these pleadings are sufficient to admit this defence; for, at the time of the conversion, the plaintiff had no title to the goods: *Young v. Cooper* (c), *Jones v. Davies* (d), *Milgate v. Kebble* (e), and *Leake v. Loveday* (f).

Bliss, Unthank, and C. Lewis in support of the rule. First, the order, if good, has no relation back to the act of bankruptcy. The opinion thrown out by this Court, in de-

(a) 21 L. J., C. P., 27.

(b) 1 Vern. 152.

(c) 6 Exch. 259.

(d) 6 Exch. 663.

(e) 3 M. & Gr. 100.

(f) 4 M. & Gr. 972.

ciding upon the necessity of the order, was not necessary to the decision upon the point before the Court. There is not any expression in the recent statute which justifies such a doctrine, and there is nothing in the spirit of the Act to lead to the conclusion that it was intended by the legislature that the order should have that effect. The old doctrine appears to have been founded on the presumption that the trader, by the improper possession of the goods of others, obtained a fictitious credit, and that his creditors thereby lost their rights. The question, therefore, turns upon a strict construction of the 125th section of the 12 & 13 Vict. c. 106. That section contains no words to give the order a retrospective effect. The words, "at the time he becomes bankrupt," have reference to and define the goods which are in the predicament provided for by the clause. Under the 21 Jac. 1, c. 19, s. 11, goods in the possession and reputed ownership of the bankrupt stood in the same position as the goods of the bankrupt himself. But that section expressly provided for that result, and the enactment accorded with the spirit of the legislation of that period; and by the 72nd section of the 6 Geo. 4, c. 16, the Commissioners had power to sell and dispose of, for the benefit of the creditors, the goods and chattels in the bankrupt's reputed ownership. But neither that section, nor the 125th section of the 12 & 13 Vict. c. 106, contains words which give that effect of relation which was created by the statute of James I. The words of the modern statute ought to be construed strictly, and not so as to divest a party of property to which he is lawfully entitled. Upon this point they cited *Lyon v. Weldon* (a), *Higgins v. M'Adam* (b), *Perry v. Skinner* (c), *Rogers v. Dejoncourt* (d), Viner's Abr. tit. "Relation," Ventris, 304,

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(a) 2 Bing. 334.

(b) 3 Y. & J. 1.

(c) 2 M. & W. 471.

(d) 7 Ir. Rep. 482.

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Blowam v. Hubbard (a), *Ex parte Styan* (b), *Doe d. Hornby v. Glenn* (c), *Keane v. Dee* (d).

Secondly, the order is bad upon the face of it, as it does not state positively that the plaintiff was in fact the true owner; if he was not, the Court of Bankruptcy had no power to make the order; and moreover, the order does not of itself divest the property. There must be an absolute sale or conveyance, to vest the property in the assignees or in the vendee; a mere order for the sale and disposal of the goods is not sufficient.

POLLOCK, C. B.—I am of opinion that this rule ought to be discharged. We adhere to the opinion which we expressed when this case was before the Court upon a former occasion. Although the opinion so expressed was to a certain extent obiter dictum, still that judgment was not pronounced without much deliberation; and notwithstanding the argument of the learned counsel for the plaintiff has made some impression on my mind, I still think that the view which was entertained by the Court on the former occasion is correct. It appears to me that the order is perfectly good. The objections raised to it are purely technical. It is said that the Court of Bankruptcy does not find that the plaintiff was the true owner, but that the order merely states that he claims to be the owner. Now, I think that where a man professes to be and claims to be the true owner, it does not lie in his mouth to make this objection. It was sufficient for the Court to say, *quoad hoc*, we admit your proof; and if you are not the true owner, the order will do you no harm. Then with respect to the effect of the order, I am of opinion that it relates back to the act of bankruptcy. I think that such relation

(a) 5 East, 407.

(b) 2 Mont. D. & De G. 219.

(c) 1 A. & E. 49.

(d) Alc. & N. 496.

exists as much in the 125th section of the 12 & 13 Vict. c. 106, which has reference to goods in the possession and reputed ownership of the bankrupt, as it does with respect to the vesting of the goods of the bankrupt himself under the 141st section of the same Act. The latter section, by which all the present and future personal estate of the bankrupt become absolutely vested in the assignees for the benefit of the creditors by virtue of their appointment, contains no such words of relation as the words "at the time he becomes bankrupt." The difference between the provision contained in the former statutes and in the present Act of the 12 & 13 Vict. c. 106, is this, that, in the former statutes, with respect to goods in the order and disposition of the bankrupt with the consent of the true owner, it was expressly enacted that property in that predicament should be assigned in the same manner as the bankrupt's own property. That was provided for by the 72nd section of the 6 Geo. 4, c. 16. The words of the 125th section are these, that "if any bankrupt at the time he becomes bankrupt" have in his possession, goods, &c., "the Court shall have power to order the same to be sold and disposed of," &c. The effect of that clause is to empower the Court of Bankruptcy to make an order with reference to the goods which were in the possession of the bankrupt at the time he became bankrupt; and when the order has been made, it seems to me that we should be introducing a very nice distinction, and one which the legislature never contemplated, if we were to hold that the order has not the effect of the old assignment, in not having relation back to the act of bankruptcy, but merely to the time when the order itself was made. I am therefore of opinion, that the construction which the Court put upon this section with reference to the effect of the order when this case was before the Court upon a former occasion, was correct. Then with regard to the question upon the pleadings, I think that the authorities cited by Mr. *Hill*, shew that this defence was

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properly admitted under the pleas of not guilty and not possessed.

PARKE, B.—I am of the same opinion. There are three points to be considered in the present case. The first is, whether the order which was made by the learned Commissioner has any such relation as that for which the defendants' counsel contend. With respect to this point an expression of opinion fell from the Court in this identical case,—my Brother *Platt* entertaining some doubt upon the principal point. [His Lordship then read that portion of the judgment already set out at pp. 416, 417, and proceeded] Now, on further consideration, and after having heard the argument of the learned counsel for the plaintiff, I am of opinion that the construction which the Court then put upon the 125th section of the recent Act is the true one. That 125th section is copied (although not exactly verbatim) from the 21 Jac. 1, c. 19, s. 11; and I think that a clause in one of a series of statutes upon the same matter ought to be construed, as far as possible, in conformity with the general intention of the legislature as expressed in former Acts. The section to which I have referred in the statute of James no doubt contained the relation to the act of bankruptcy. The 13 Eliz. c. 7, which was the preceding statute upon the same subject, and which regulated the title of the commissioners appointed by the Lord Chancellor to dispose of the effects of the bankrupt, and made every direction, bargain, sale, and other thing done by them effectual in law to all intents and purposes against the bankrupt, and against all other persons claiming under him, had the same relation back to the act of bankruptcy. I think that the order of the Commissioner has precisely the same effect, with respect to its relation back, as the title of the commissioners had under the 21 Jac. 1, c. 19, by which they were empowered to dispose of goods in the possession and reputed ownership

of the bankrupt as fully as they could of his other property; and that no subsequent act either of the bankrupt or of the reputed owner could defeat their title. There is no reason why we should not give such effect to the 125th section; for I cannot find any expressed intention on the part of the legislature to destroy that relation which existed under former statutes; and it is my opinion, and that of the other members of the Court, that, when the Commissioner made the order disposing of the property in question by sale, such disposition was valid, and had relation back to the time of the act of bankruptcy, unless there be some clause in this statute by which the goods are protected. But there is no pretence for saying that there is any such clause. I therefore think, that the 125th section is to be construed in conformity with the preceding statutes upon the same subject, and that the order has relation back to the time of the act of bankruptcy. As to the second point, respecting the form of the order, I think that the criticisms which have been passed upon it were not well founded. Under the 125th section, a power is given to dispose of this property by an order vesting it in the assignees, for the purposes of equal distribution. There is no power of sale by the Court; but there is to be an order vesting the property in the assignees, as far as the Commissioner lawfully may. Then, with respect to the recital that the plaintiff claims to be true owner, I think that it may be taken that the order had not such relation, unless in point of fact the plaintiff was the true owner. But the order is perfectly good and sufficient to pass the property in the goods. The last objection is, that the defendants were not at liberty to rely upon this defence under the plea of not possessed. The plaintiff, however, had merely a defeasible title, and one which was defeated *ex post facto* by the order, which had relation back to the act of bankruptcy; he, therefore, had no property in the goods at the time

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of the conversion. This point, however, was in fact abandoned by the plaintiff's counsel.

ALDERSON, B.—I am of the same opinion. The first and the last points are virtually the same; for if the order had the effect contended for, the plaintiff had no property in the goods at the time. Under the 125th section of the recent Act, the Court of Bankruptcy has the power to make the order; and the moment that order is made, the goods become vested in the assignees or other parties, from the time when the power first began to operate upon the goods. The language used in this section is not precisely the same as that to be found in the statute of James; but I think that in substance and effect it is the same. Under that statute the relation back existed; and I think that in this respect the recent statute has not effected any alteration. I also think that this order is perfectly good and valid.

Rule discharged (a).

(a) *Martin, B.*, had left the Court. See *Heslop v. Baker*, 1 De G., Mac. & G. 479. In *Quartermaine v. Bit-*

stone, 17 Jur. 281, an order which did not specify the goods was held to be insufficient.

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Jan. 14.

THIS was an action upon a policy of insurance for 6000*l*. on goods shipped in a vessel called the Samuel Hicks, on a voyage from Baltimore to London. The declaration also contained a count for money had and received.

The defendant pleaded, first, the general issue to the whole declaration; and sixthly, to the first count, that, before and at the time of the making of the policy, the plaintiffs and the said H. P. as their agent, as in the declaration mentioned, to induce the defendant to become and be such insurer, falsely misrepresented to the defendant that the said ship had sailed from Baltimore on a certain day and year in that behalf, to wit, the 12th January, A. D. 1850, whereas, in truth and in fact, the said ship had sailed from Baltimore on an earlier day, to wit, on the 3rd January, 1850, as the plaintiffs and the said H. P., at the time of making such misrepresentation, respectively well knew; and that the said misrepresentation was that of a fact then material to be known to the defendant, and then material to the risk of the said policy; and that the defendant was induced to make the policy by and through such misrepresentation as aforesaid, and then believing the same to be true, and not otherwise.

The defendant pleaded, seventhly, to the first count, that before and at the time of the making of the policy, to wit, on &c., the plaintiffs and the said H. P. as their agent, to induce the defendant to become and be such insurer as therein mentioned, falsely misrepresented to the defendant that they the plaintiffs then had other goods on board the said ship, of great value, &c., upon which they the plaintiffs had effected no insurance, and that the said goods were not the goods of the said plaintiffs; whereas, in truth and in fact, they the plaintiffs had

To an action on a policy of insurance, a plea, that the insurer was induced to enter into the policy by a false misrepresentation of a material fact, made by the assured and their agent, such misrepresentation being, at the time it was made, false to the knowledge of the insured and their agent, is supported by proof, either of concealment or of misrepresentation not fraudulent.

Sembla, that, upon taxation, the defendant would not be entitled to such costs as had reference to the proof of fraud.

Where a policy is avoided by concealment or by misrepresentation not fraudulent, the assured is entitled to a return of the premium, and the policy is conclusive evidence of the receipt of the premium by the insurer.

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not then any other goods on board the said ship or vessel upon which they had effected no insurance; and whereas the said goods in the said first count mentioned then were the goods of the plaintiffs, as they the plaintiffs and the said H. P., at the time of making the said misrepresentation, respectively well knew. The plea then proceeded to state, that the misrepresentation was of a material fact, and concluded in the same manner as the previous plea. To these pleas the plaintiff replied *de injuriâ*, and issue was joined thereon.

At the trial, before *Pollock*, C. B., at the last London Sitings, all imputation of fraud or misconduct on the part of the plaintiffs personally was abandoned; but the jury found that the plaintiffs' agent had been guilty of the misrepresentation charged, but without fraud, by concealing the fact of the true time of sailing, the vessel having left Baltimore some days before the time mentioned in the policy; and upon that ground a verdict was entered for the defendant on the issues raised by the sixth and seventh pleas. The other issues were found for the plaintiffs.

In the present Term (Jan. 14),

Sir *F. Kelly* moved for a rule nisi for a new trial, on the ground that the verdict was against the evidence; and also on the three following grounds of misdirection. First, that the learned Judge did not with sufficient precision leave the question to the jury of the materiality of the statements of the plaintiffs' agent on making the policy: *Williamson v. Alison* (a), 2 Duer on Marine Insurance, p. 689, *Elton v. Larkins* (b). Secondly, that the simple fact of a material concealment by the agent, without fraud on the part of the plaintiffs, did not support the sixth and seventh pleas. And thirdly, that, at all events, in the absence of the proof of fraud, the plaintiffs were entitled to recover the

(a) 2 East, 46.

(b) 5 Car. & P. 836.

amount of the premium under the last count: *Dalsell v. Mair* (a), *Penson v. Lee* (b), *Feiss v. Parkinson* (c).

Cur. adv. vult.

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POLLOCK, C. B., now said, that the Court had taken time to read the notes of the trial, and to consider the objections raised; and that they were of opinion that there ought to be no rule, upon the defendant consenting that the count for money had and received should be struck out of the declaration. That it would seem that the claim to the return of the premium had been abandoned at the trial; and that, if the count mentioned were struck out, the plaintiffs would not be debarred from recovering the premium, if they should seek to do so upon a future occasion.

PARKE, B. (after stating that he agreed with the Lord Chief Baron in refusing the rule on the ground of the verdict being against evidence, added)—I am of opinion that none of the other objections are well founded. Much reliance was placed on the form of the sixth and seventh pleas; and it was contended, that, inasmuch as those pleas alleged a *fraudulent* misrepresentation on the part of the plaintiffs, in order to sustain the pleas, it was necessary to prove the fact as fully as alleged; and it was very strongly urged that the plaintiffs had been subjected to a great hardship in being compelled to combat such pleas, by having to procure evidence to disprove the matters of fraud, it turning out afterwards on the trial that there was no such imputation of fraud on the plaintiffs. But the pleas were supported by proof of material communications by the agent; for, in cases of insurance, material misstatement or concealment vitiates the contract, and whether it be fraudulently made or not is a matter which is wholly immaterial, except with reference to the return of the premium. Now, on look-

(a) 1 Camp. 532. (b) 2 B. & P. 330. (c) 4 Taunt. 640.

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ing at the form of these pleas, it is perfectly clear that, in order to support them, it is not necessary to prove fraud; and if the allegation imputing fraud were struck out, still the pleas would be good, as founded either upon concealment or upon misrepresentation not fraudulent. This principle has been acted on in some cases, and more particularly in the two recent decisions in the Court of Common Pleas, of *Southall v. Rigg* and *Forman v. Wright* (a). It is well established, that if, after striking out allegations in a plea, that which is the material part be left, the plea is good, and the defendant sustains it by proving that part (b). With respect to the costs which the learned counsel stated that the plaintiffs had been put to in order to repel the charge of fraud, I apprehend that would be a question for the Master, and that he would not allow all the expenses as to the fraud, inasmuch as the pleas were supported on a different ground. That, however, would be no foundation for a new trial, as the learned Judge was perfectly right in ruling that these pleas were supported by the simple fact of the concealment. Then, with regard to the objection that the learned Judge did not leave the materiality of the representation to the jury with sufficient distinctness, it was idle for him to do so, because the facts spoke for themselves. The representations were material, and were admitted to be so. With respect to the return of the premium, there is no doubt in my mind that the plaintiffs would be entitled to recover it, as there was no fraud in the representation; if there had been, the case would be different. The insurance never bound the defendant, and consequently the plaintiffs were entitled to the return of the premium. The old law, and which is as old as the time of Lord *Mansfield*, is, that the defendant is estopped by signing the policy from saying he has not received the premium. But it seems to me that, inasmuch

(a) 20 L. J., C. P., 145. (b) See *Thom v. Bigland*, post.

as this matter was not mentioned until the jury had retired to consider their verdict, the justice of the case will be amply satisfied by granting the plaintiffs an opportunity of recovering the premium hereafter; and, in my opinion, they will be entitled to do so in an action for money had and received.

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ALDERSON, B., and MARTIN, B., concurred.

The defendant's counsel then stated, that he consented to the last count being struck out of the declaration; and the Court said there would be no rule.

Rule refused accordingly.

REGULA GENERALIS.

ON the last day of the present Term, the following ORDER was read in Court by the Queen's Remembrancer:—

Hilary Term, in the 16th year of the reign
 of her Majesty Queen Victoria.

The 31st day of January, 1853.

ENGLAND. { WHEREAS, by an Order of this Court, made in
 Hilary Term, in the 1st and 2nd years of King
 James the Second, it was Ordered, that all bishops, deans,
 port officers, sheriffs, coroners, and mayors, should give to
 the messengers of this Court a receipt upon delivery of
 port books, writs, or any process out of this Court directed
 to them, whereby this Court might more certainly know
 that such port books, writs, and process had been duly delivered
 unto them. Now, upon application of the Queen's
 Remembrancer in this Court, shewing that, by the 32nd

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section of the Act 15 & 16 Vict. c. 73, the duties hitherto performed by the messengers of this Court, so far as regards the process issued and issuing from the office of her Majesty's Remembrancer in the Court of Exchequer, and of the Treasurer of the Governors of the Bounty of Queen Anne on the seal day next after each and every Term, shall, from and after the abolition of the said offices of messengers of the Court of Exchequer, be discharged by her said Majesty's Remembrancer and his officers under his direction, and the officers of the said Treasurer of the Governors of the Bounty of Queen Anne. And it appearing that the said offices have now been abolished, it is therefore Ordered by this Court, that in future all bishops, deans, port officers, sheriffs, coroners, and mayors, do transmit to the said respective officers, from whose offices the process may issue, a receipt upon delivery to them of any writs or process of this Court directed to them and issuing out of either of the said offices.

The form of such receipt to be settled by her Majesty's Remembrancer.

By the Court, (Signed) FREDK. POLLOCK, C. B.
J. PARKER.
T. J. PLATT.
SAML. MARTIN.

Intretur, (Signed) H. W. VINCENT, Q. R.

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HILARY VACATION, 16 VICT.

SIMMONS v. LILLYSTONE.

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CASE.—The venue in the margin of the declaration was *London*. The first count stated, that, before and at the time of the committing of the grievances, &c., the plaintiff was possessed of a certain messuage and premises, situate and being, to wit, at Milton next Gravesend, in the county of Kent, adjoining to and abutting on the north upon a certain public navigable river, to wit, the river Thames,

The venue in the margin of a declaration was "*London*," and the first count stated that the plaintiff was possessed of certain premises, situate at Milton, in the county of Kent, abutting on the

north on a public navigable river, to wit, the river Thames, on the east upon another part of the said river called the Blockhouse Dock, in which premises the plaintiff and the previous occupiers had carried on the trade of mast and block-makers for sixty years; and the plaintiff, as such occupier, ought to have the free use and navigation of the river, and of the part thereof called Blockhouse Dock, for the more convenient carrying on his said trade, and with boats, rafts, and timber to pass from the stream of the river to the side of the premises abutting on the Blockhouse Dock, either at high or low water, and also to pass from the said premises and the Blockhouse Dock either at high or low water into the stream of the river, and to load and unload their boats, barges, and other vessels at the side of the said premises: Yet the defendant wrongfully placed upon the soil of the said river, and upon the soil of that part thereof called the Blockhouse Dock, divers piles, posts, and great quantities of earth, and therewith formed an embankment, and obstructed the navigation of the river, and prevented the plaintiff having access from the stream of the river to the side of his premises, whereby the plaintiff sustained special damage. The second count was in trover for goods and chattels. The defendant pleaded to the whole declaration, not guilty; and to the second count, that the defendant was possessed of a close, and, at the time of the alleged conversion, was digging upon it a sawpit, and because the goods and chattels in the second count mentioned were without the leave and license of the defendant placed on the close by the plaintiff, and "were then so buried in the close, and so embedded in the earth and soil thereof," that, without a little cutting the same, the defendant could not dig the sawpit, the defendant, in such digging, necessarily and unavoidably a little cut the said goods and chattels. Replication, *de injuriâ*. At the trial, it appeared that the premises were situate, and the obstruction took place, in the county of Kent. The evidence in support of the second count was, that some timber of the plaintiff's being on the close of the defendant, he removed it, and it having been again placed there, and become embedded in the soil, he directed his workmen to dig a sawpit at the place where the timber was, and in digging the pit the timber was cut through, and part remained embedded in the soil, and other part was washed away by the river. The Judge directed the jury to consider whether the defendant really and *bonâ fide* intended to make a sawpit, or was merely digging a hole for the purpose of cutting the timber:—*Held*, first, that, whether the cause of action in the first count was local in its nature or not, the defendant was not entitled to a verdict on that count, since the declaration contained no allegation which rendered it necessary for the plaintiff to prove that the obstruction took place in the city of London.

Secondly, that the first count was good on motion in arrest of judgment, since it described a private and peculiar damage to the plaintiff from the obstruction of the river.

Thirdly, that there was no sufficient evidence of a conversion.

Fourthly, that the Judge misdirected the jury, in telling them to consider with what *notice* the defendant dug the sawpit.

Seemle, that the cause of action in the first count was local in its nature.

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and adjoining to and abutting on the east upon a certain other part of the said river, called, to wit, the Blockhouse Dock, in which said messuage and premises the plaintiff, before and at the time of the committing of the grievances, &c., carried on the trade and business of mast and block-maker, and in which said messuage and premises the plaintiff and the previous occupiers of the said messuage and premises had uninterruptedly carried on the said trade and business of mast and block-makers for a long space of time, to wit, sixty years before the committing of the grievances, and during all the time aforesaid the occupiers of the said messuage and premises were accustomed and of right entitled to have, and the plaintiff, being such occupier, still of right ought to have, full and free use and navigation of the said river, and of the said part thereof called the Blockhouse Dock, for the due occupation and enjoyment of the said messuage and premises, and for the more convenient and advantageous carrying on of the said trade and business therein, and with boats, barges, and other vessels, and also with rafts, floats, and timber, to approach and pass from and out of the stream or current of the said river to and unto the said side of the said messuage and premises, abutting as aforesaid upon the part of the said river called the Blockhouse Dock, and into and to the shore or beach of that part of the river called Blockhouse Dock, either at high or low water, and also to depart and pass from the aforesaid side of the said messuage and premises, and from and out of the part of the said river called Blockhouse Dock, and from the shore or beach thereof, either at high or low water mark, unto and into the stream or current of the said river, and to load and unload their boats, barges, and other vessels at and upon the side of the said messuage and premises, or at and upon the beach or shore of the part of the said river called Blockhouse Dock, and to land their rafts, floats, and timber at the said side of the said messuage and premises,

and at or upon the beach or shore of the part of the said river called Blockhouse Dock, either at high or low water, and to moor, for a reasonable time, their said rafts, floats, and timber in the part of the river called Blockhouse Dock, without hindrance or obstruction from any person or persons whatsoever: Yet the defendant, intending to injure the plaintiff, and to interrupt him in the carrying on of his said trade and business, heretofore, to wit, on &c., and on divers other days &c., without the leave of the plaintiff, unlawfully, wrongfully, and injuriously placed and fixed, in and upon the soil of the said river Thames, and in and upon the soil of that part thereof called Blockhouse Dock, upon which the said messuage and premises of the plaintiff so abutted on the east side thereof as aforesaid, divers piles, posts, planks, and timber, and divers great quantities of earth, stone, brick, and rubbish, and therewith formed an embankment in and upon the said part of the river called Blockhouse Dock, and unlawfully kept and continued the same there from thence hitherto, and thereby during all that time hindered and obstructed the use and navigation of that part of the said river called the Blockhouse Dock, and hindered and prevented the plaintiff from approaching and having access from the open tideway, stream, or current of the river to the side of the messuage and premises so abutting on the part of the river as aforesaid, and from bringing his boats, rafts, floats, and timber from the open tideway, stream, or current of the river to the side of his messuage and premises, for the purposes of his trade and business, &c.—It was then alleged as special damage, that, by reason of the obstruction, the plaintiff was prevented from landing a quantity of timber, which was in consequence washed away by the tide.

The second count was in trover for the conversion of goods and chattels, to wit, 500 pieces of timber.

Pleas (inter alia) to the whole declaration, not guilty.

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To the second count, (sixthly), that, before and at the time of the alleged conversion of the goods and chattels in the second count mentioned, the defendant was possessed of a close situate in the parish of Milton next Gravesend in the county of Kent, and the defendant, at the time of the alleged conversion, was excavating the earth and soil of the said close, for the purpose of making, and was then excavating, digging, and making, in and upon the said close, a certain sawpit, for the more beneficial and profitable use and enjoyment of the said close; and because the said goods and chattels were, without the leave or license of the defendant, and against his will, and contrary to his express command in that behalf, put and placed upon the said close by the plaintiff, and were then so buried in the said close, and so embedded in the earth and soil thereof, that, without a little cutting the same, the defendant could not excavate, dig, or make the said sawpit upon the close, the defendant at the time of the alleged conversion, in order so to dig and make the said sawpit, and in the course and progress of such excavating, digging, and making of the same, necessarily and unavoidably a little cut the said goods and chattels, doing no unnecessary damage, &c., as he lawfully might for the cause aforesaid; *quæ sunt eadem*.—Verification.

The plaintiff joined issue on the first plea, and to the other replied *de injuriâ*.

At the trial, before *Pollock*, C. B., at the London Sittings after last Michaelmas Term, it appeared that the plaintiff carried on the business of a mast, oar, and block-maker at Milton next Gravesend. His premises adjoined the river Thames, and on one side abutted on a small dock or inlet called the Blockhouse Dock. The plaintiff and the previous occupiers of his premises had been accustomed to use this dock for mooring their masts, spars, or timber, to be worked up in their business. All the plaintiff's premises were situate in the county of Kent. The defendant,

who was also the occupier of premises near to this dock, claimed a right to it, and, in the year 1852, commenced embanking it, and thereby caused the obstruction complained of in the first count of the declaration. The evidence in support of the second count was, that certain pieces of timber or spars used for making bowsprits, and belonging to the plaintiff, being on the defendant's land, he caused them to be removed; and upon the timber being again placed there, and having become embedded in the soil, the defendant directed his workmen to dig a sawpit in his land, and in so doing they cut through the timber, leaving the pieces there, and part of them was afterwards carried away by the tide of the river, which at high water flowed over the land, the other part remaining embedded in the soil.

It was objected, on the part of the defendant, that the first count was not proved, inasmuch as the action was local in its nature, and as the count contained no description of the place where the obstruction was committed, it must be assumed to have been done in the city of London, where the venue was laid. It was also objected, that there was no evidence of a conversion. With respect to the first objection, the learned Judge reserved leave to the defendant to move to enter a verdict for him; and his Lordship, being of opinion that there was *prima facie* evidence of a conversion, left it to the jury to say, with reference to the sixth plea, whether the defendant really and *bonâ fide* intended to make a sawpit, or merely dug the hole for the purpose of cutting the timber. The jury found a verdict for the plaintiff on the first count, damages 1*s.*; and on the second count, damages 60*l.*

Bramwell, in last Michaelmas Term, moved to enter a verdict for the defendant on the first count, pursuant to the leave reserved, or for a new trial on the ground of misdirection, or to arrest the judgment on the first count.

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He submitted, in arrest of judgment, that, as the injury complained of was the obstruction of a public navigable river, the plaintiff could not maintain an action, but that the only remedy was by indictment.

The Court, however, were clearly of opinion that, as the declaration disclosed a private and peculiar damage to the plaintiff, he might maintain the action (a), and refused a rule on that ground.

A rule nisi having been granted on the other points,

Shee, Serjt., and *Rose* shewed cause in Hilary Term (Jan. 27)—First, the verdict cannot be entered for the defendant on the first count, unless he establishes that this is a local action, and that there is some issue on the record involving the question of locality: *Boyes v. Hewatson* (b), *Mayor of London v. Cole* (c). But there is no issue raising that question, and this is not an action local in its nature. There is no complaint of an injury to the realty, or to any incorporeal right arising out of it; but the foundation of the action is the private and peculiar damage sustained by the plaintiff in consequence of the obstruction of a public navigable river. Such obstruction, of itself, would afford no ground of action: *Rose v. Groves* (d), *Rose v. Miles* (e). This resembles an action for setting up a mark against a person's dwelling-house, in order to defame him, which is not local in its nature: *Jefferies v. Duncombe* (f). There the declaration, after describing the house as situate in a certain parish, stated the nuisance to be "erected and placed in the parish aforesaid;" and that was ascribed to venue, and not to local description. So here, the statement of the situation of the plaintiff's house is mere matter of venue. The distinction between venue and local descrip-

(a) See *McKinnon v. Penson*, ante, p. 319.

(b) 2 Bing. N. C. 575.

(c) 7 T. R. 583.

(d) 5 M. & Gr. 613.

(e) 4 M. & Selw. 101.

(f) 11 East, 227.

tion is preserved by the Pleading Rules, H. T., 1853, rr. 4, 16, 19. In a count by indorsee against drawer of a bill payable in London, the venue being "London," a general allegation of presentment was held a sufficient allegation of presentment in London, since the rule H. T., 4 Will. 4, r. 8: *Boydell v. Harkness* (a). *Warren v. Webb* (b); which is relied upon by the other side, cannot be supported.—[*Parke, B.*—It is certainly very difficult to understand that case.] The objection might have been open on special demurrer, but after verdict it is cured by the statute 16 & 17 Car. 2, c. 8, s. 1.

Secondly, there was evidence of a conversion. In order to constitute a conversion, it is not necessary that there should be an acquisition of property by the defendant; it is sufficient if there be a deprivation of property to the plaintiff: *Keyworth v. Hill* (c).—[*Parke, B.*—Here the defendant never intended to take to himself any property in the timber.]—If a person purposely left the gate of a field open so that a horse escaped, that would amount to a conversion.—[*Parke, B.*—The form of a count in trover, prescribed by the Common Law Procedure Act, 15 & 16 Vict. c. 76, Sched. (B.), is, "that the defendant converted to his own use, or wrongfully deprived the plaintiff of the use and possession of, the plaintiff's goods." Suppose a person threw a stone into a room through an open window, and broke a looking-glass, would that be a conversion of it?—It is submitted, that any wilful damage to a chattel, whereby the owner is deprived of the use of it in its original state, is a conversion.—[*Platt, B.*—Taking wine from a cask and filling it up with water is a conversion of the whole liquor: *Richardson v. Atkinson* (d).]—The principle laid down in *Fouldes v. Willoughby* (e) is, that a mere wrong-

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(a) 3 C. B. 168.

(b) 1 Taunt. 379.

(c) 3 B. & Ald. 685.

(d) 1 Str. 576.

(e) 8 M. & W. 540.

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ful asportation does not amount to a conversion, unless the taking or detention of the chattel is with intent to convert it to the taker's own use or that of some third person, or unless the act done has the effect either of destroying or *changing the quality* of the chattel. Here, the cutting of the timber destroyed it *as timber*. In the case of two tenants in common, each has an interest in the chattel, so that nothing short of an absolute destruction of it will amount to a conversion; but, in ordinary cases, any injury which alters the nature or quality of the chattel, is a conversion of it.

Thirdly, the learned Judge properly left it to the jury to say, whether the defendant really intended to make a saw-pit, or only dug the hole for the purpose of cutting the timber. The sixth plea could not be proved unless the defendant was in fact digging a sawpit, and for that purpose it was necessary to cut the timber. That is not a mere question of motive, but the substance of the issue.

Willes in support of the rule.—First, this is an action local in its nature. In Com. Dig. "Action" (N.), under the head "In what county an action shall be sued," after real actions, there follows (N. 5): "Action founded upon any thing local;" and this general rule is laid down: "So every action founded upon a local thing shall be brought in the county where the cause of action arises, for there it can be best tried." An action on the case for a nuisance has generally been considered as an action arising out of something local. The plaintiff's complaint is either founded on an illegal act done to his house situate in the county of Kent, or it is founded on the peculiar damage resulting to him from the defendant committing a public nuisance; but, in either case, the action savours of locality. If the defendant had demurred, the answer would have been that the rule of H. T., 4 Will. 4, r. 8 (a), dispenses with any state-

(a) The Pleading Rule of Hilary Term, 1853, r. 4, is in terms the same.

ment of venue in the body of the declaration.—[*Parke*, B.—The rule provides, that in all cases where local description is now required, such local description shall be given. This declaration states that the plaintiff's house was situate in the county of Kent, but it does not state that the injury was done within that county.]—Where no county is mentioned in the body of the declaration, it will be intended that the act complained of was done in the county named in the margin: *Cook v. Swift* (a), *Hall v. Wal-land* (b), *Warren v. Webb* (c), *Sutton v. Fenn* (d); and, if so, this declaration was not proved.—[*Parke*, B.—In the case of *The Bailiffs of Lichfield v. Slater* (e), *Willes*, C. J., expressed an opinion that the statute 16 & 17 Car. 2, c. 8, had been misconstrued; but that, as the authorities were so numerous, he considered himself bound by them. In that case, I do not see how the defendant could have demurred, and yet the defect of venue was held to be cured by the verdict.]—The true principle is this, that, where local description is necessary, the gravamen must be proved to have happened at the particular place named, but where local description is not necessary, the place named will be referred to venue, and it is sufficient to prove the gravamen at any place within the county: *Mersey Navigation v. Douglas* (f).—They also referred to *Wms. Saund*. 308, note (l), *Hamer v. Raymond* (g), *Dobson v. Blackmore* (h).

Secondly, the cutting of the timber was a mere act of trespass, and not a conversion. In *Richardson v. Atkinson*, the conversion consisted in adding water to the remainder of the wine. If a bailee of a cask of wine consumes part of it, that is not a conversion of the whole: *Philpott v. Kelley* (i). In *Kent's Commentaries* (k), in treating of "ori-

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(a) 14 M. & W. 235.

(b) Cro. Jac. 618.

(c) 1 Taunt. 379.

(d) 3 Wils. 339.

(e) Willes, 431.

(f) 2 East, 497.

(g) 5 Taunt. 789.

(h) 9 Q. B. 991.

(i) 3 A. & E. 106.

(k) Vol. 2, p. 360, 4th edit.

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ginal acquisition by succession," various instances are adduced of one person's property becoming that of another, in consequence of the nature of the article being changed by reason of the latter having expended upon it his skill, labour, or materials; but there is no case to the effect that an injury to a chattel vests the property in it in the wrongdoer. The question is, whether the act done was an assertion of property on the part of the defendant, or a mere act of violence. *Heald v. Carey* (a) decided that there is no conversion of goods for which trover will lie, unless there be a repudiation of the right of the owner, or the exercise of a dominion over them inconsistent with that right.

Thirdly, the learned Judge misdirected the jury, in leaving to them the motive with which the defendant dug the pit: *Oakes v. Wood* (b). The question was whether he was entitled to do so, and that cannot depend upon his intention. If he had the right, it is immaterial with what motive he acted, and he was justified in so doing, notwithstanding he injured the plaintiff.

Cur. adv. vult.

PARKE, B., now said (after stating the pleadings)—The point reserved by the Lord Chief Baron was, whether, inasmuch as the obstruction complained of took place in the county of Kent, the declaration was proved, the venue having been laid in the city of London, and the premises being described as situate in the county of Kent. We think that the rule to enter the verdict for the defendant on the first count ought to be discharged, because we cannot find any allegation in the declaration which makes it necessary for the plaintiff to prove that the obstruction took place in the city of London. The rule referred to in the course of the argument, that the name of the county

(a) 21 L. J., C. P., 97.

(b) 2 M. & W. 791.

in the margin is to be considered as indicating the venue, does not apply where local description is necessary. There is no allegation in this declaration that the injury was done in the city of London, and therefore it was not necessary to prove that it was done there. Probably the objection might have been raised by special demurrer; but, after verdict, it certainly comes too late, because then any defect in the venue is cured by the statute 16 & 17 Car. 2, c. 8. It is enough for the present purpose to say, that there is nothing which makes it necessary to prove, on the part of the plaintiff, that the obstruction took place in the city of London. There is a case in Taunton's Reports (a), which it is extremely difficult to explain; but, at all events, the declaration in that case differs from the present. It is unnecessary to decide whether this is a local action, though I am rather disposed to think it is, since it is an injury to the plaintiff's premises. The result is, that this part of the rule will be discharged,

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(a) *Warren v. Webb*, 1 Taunt. 379.

In the copy of Taunton in the library of the Court of Exchequer, the case of *Warren v. Webb* is corrected by Alderson, B., as to the facts, by stating "the premises were *all* proved to be in Surrey;" and as to the judgment as follows: "The objection taken in this case was, that the plaintiff did not, at the trial, support his declaration. The defendant's counsel supposed that, in the declaration, the defendant's *shop and spout* were alleged to be in Middlesex, and the evidence was that they were in Surrey. On reading the declaration, it at first appeared to me, that the videlicet, in the county of Middlesex, as applied to a *spout*

or anything else in Surrey in its nature local, is nonsense, and a contradiction in terms. And, upon consideration, the true sense appears to be this: it is a description of the *defendant's premises*, a local object, which it states to be in Middlesex, and consequently the objection must prevail. If this is not a description of the place where the defendant's premises are situated, there is no description of *them*; and if no place is alleged in the declaration, it must be intended that the *premises lie* in the county in which the nuisance is alleged to be committed, which is Middlesex. Therefore, *quâcunque viâ datâ*, the declaration is not supported."

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and the verdict for the plaintiff will stand on the first count, with 1s. damages.

The next question, which relates to the count in trover, is, whether there was any evidence of a conversion. Now the evidence was, that the pieces of timber were cut in two by the defendant; that they were left embedded in the soil—not applied to the defendant's own use;—and that part of them was carried away by the tide. Without advertg to the plea of justification, we are all of opinion that there was no sufficient evidence of a conversion to entitle the plaintiff to a verdict on the plea of not guilty. In order to constitute a conversion, there must be an intention of the defendant to take to himself the property in the goods, or to deprive the plaintiff of it. If the entire article is destroyed, as, for instance, by burning it, that would be a taking of the property from the plaintiff and depriving him of it, although the defendant might not be considered as appropriating it to his own use. In this case, nothing is done but cutting the timber, and, by accident, it is washed away by the river—not purposely thrown by the defendant to be washed away;—consequently, we think that does not amount to a conversion. Assuming that it was *prima facie* a conversion, then the question would arise whether that conversion was not excused by the right which the defendant had to make the sawpit, and to cut the timber in making it, if he was not able to do it in any other way. But, without deciding that, we think that there was no evidence to warrant the jury in finding that this timber was converted by the defendant to his own use, that is, either by taking the whole property to himself, or asserting title in another, or depriving the plaintiff of the property. None of those alternatives are made out by the evidence, and consequently there ought to be a verdict for the defendant on the plea of not guilty to the count in trover.

Then, with regard to the sixth plea [his Lordship stated

the plea.]—It was alleged that the Lord Chief Baron misdirected the jury as to the meaning of that plea, when he left to them the question, whether the defendant, when he cut the timber, had really and bonâ fide an intention of making a sawpit. We think that the Lord Chief Baron was not correct in the view which he took, for there is no doubt that the defendant had a perfect right to make a sawpit on his own property. If, in truth, he chose to make a hole in the soil for any purpose whatever,—for the purpose is immaterial,—the land being his own,—and if he could not remove the timber which was wrongfully placed there without cutting it, he would be justified in doing so; and his intention of making a sawpit is therefore immaterial. But, even if the form of the plea made it necessary for the defendant to prove that his object was not to make a hole but a sawpit, there was evidence that he used this hole as a sawpit. We think that the Lord Chief Baron was not right in leaving to the jury the question of the bona fides of the defendant in making the pit. That could not be inquired into. But, on looking at the plea, it is clearly bad, because it does not state that the timber was buried *by the plaintiff*; and if it was buried by the defendant, he would have no right to use the existence of an obstruction which he himself had caused as a justification for his cutting the timber. This, therefore, being a bad plea, it is unnecessary for the interests of the defendant to send the case down for a new trial, because he is entitled to a verdict, at all events, on the plea of not guilty to the count in trover. As to the sixth plea, the jury should be discharged by consent from giving a verdict upon it. Therefore the rule, so far as respects the first count, will be discharged, and it will be absolute to enter a verdict for the defendant on the second count, and, by consent, to discharge the jury as to the sixth plea.

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Rule accordingly.

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BULL and Another v. CHAPMAN and Another.

The 23rd section of the Joint-stock Companies Registration Act, 7 & 8 Vict. c. 110, by which it is lawful for the promoters of a Company (being a Joint-stock Company within the meaning of the Act), upon being provisionally registered, to assume the name of the intended Company, to open subscription lists, &c., absolutely prohibits the promoters from making calls, from purchasing, contracting for, or holding land, or from entering into contracts for any services, or for the execution of any works, &c., except such services, &c., are necessarily required for the establishing of the Company, and except the contract or purchase be made conditional on the completion of the Company, and to take effect after the certificate of complete registration, &c.; and such contracts so prohibited are illegal, and a defence founded upon this section must be specially pleaded.

ASSUMPSIT.—The first count of the declaration was for the breach of an agreement made between the plaintiffs, the promoters of an undertaking called the Plymouth and North Cornwall Railway Company, provisionally registered, of the one part, and the defendants, the managing committee of the Cornwall and Devon Central Railway Company, also provisionally registered, of the other part. The last count was a common count for plans, sections, and books of reference sold and delivered, for work and materials, for money paid, and for money due on divers accounts stated.

To the last count the defendants pleaded, that before and at the time of the making of the contract and promise in this plea and in the said last count mentioned, each of the said Companies was a Joint-stock Company within the true intent and meaning of the Joint-stock Companies Act, 7 & 8 Vict. c. 110, and not being a banking Company, school, &c., and each of which said Joint-stock Companies then was a partnership consisting of more than twenty-five members, and the formation of each of which said Companies was commenced after the said 1st of November, A. D. 1844, to wit, on the 2nd of November, A. D. 1844, and each of which said Companies then was established in a part of the United Kingdom of Great Britain and Ireland, not being in Scotland, for a certain purpose of profit; and further, that, after the 1st of November, 1844, and before the commencement of this suit, to wit, on the day and year in the last count mentioned, a contract was made and entered into between the plaintiffs, then being the promoters of the said first-mentioned Company, as such promoters of

the said first-mentioned Company on behalf of the same Company, of the one part, and the promoters, of whom the defendants then were two, on behalf of the said secondly-mentioned Company, of the other part; whereby the plaintiffs, as such promoters as last aforesaid of the said first-mentioned Company, in consideration of certain reward to be therefore paid to them by the said promoters for the said secondly-mentioned Company, as such promoters for and on behalf of the said secondly-mentioned Company, undertook and agreed that they the plaintiffs and the said first-mentioned Company should and would perform certain services for the said secondly-mentioned Company, which said services and the said payment of which said reward were not, nor was any part thereof, necessarily required for the constituting or establishing of the said Companies or either of them, or for obtaining letters patent or a charter or act of incorporation, or other Act of Parliament, for or on behalf or in respect of the said Companies or either of them; and further, that the said work in the said last count alleged to have been done by the plaintiffs for the defendants, and materials for the same provided by the plaintiffs for the defendants, and the said plans, sections, and books of reference alleged to have been sold and delivered by the plaintiffs to the defendants; and the said plans, sections, and books of reference alleged to have been deposited by the plaintiffs with the defendants, and alleged by them to have been appropriated and used; and the said money alleged to have been paid by the plaintiffs to the use of the defendants, and the said money alleged to be due and owing on divers accounts alleged to have been stated between the plaintiffs and the defendants, were, and every part thereof was, respectively so done, provided, sold, and delivered, deposited, appropriated, and used, and paid, and due and owing, and stated, as in the last count respectively mentioned, under and by virtue and in pursuance of the said contract,

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and for and on account of no other matter or thing whatsoever; and the said promise of the defendants in the last count of the declaration mentioned is the same identical promise so made by the said promoters of the said secondly mentioned Joint-stock Company, of whom the defendants then were two as aforesaid, and was made to the plaintiffs as such promoters of the said first-mentioned Company as aforesaid by the defendants as two of the said promoters, and jointly with the others of the said promoters, in manner and form as in this plea above mentioned, and not any other promise whatsoever, or made in any other manner whatsoever; and further, that the said Joint-stock Companies, at the time of the making of the said contract or promise in this plea and in the last count above mentioned, or at the time of the doing of the said work or any part thereof, or of the providing of the said materials or any part thereof, or at the time of the sale and delivery of the said plans, sections, and books of reference, or of the said depositing, appropriating, or using of the said plans, sections, and books of reference, or any part thereof, or at the time of the paying of the said money or any part thereof, or at the time of the stating of the said accounts or either of them, or at any other time, completely registered as required by the same Act of Parliament, or incorporated by statute or charter, or authorised by statute or letters patent to sue and be sued in the name of any officer or person; and that the said plans, sections, and books of reference, at the time of the making of the said contract, and at the time of the said sale and delivery, depositing, appropriating, and using of the said plans, sections, and books of reference, were stores not necessarily required for the establishing of the said Company, of all which premises the plaintiffs had notice at the time of the said making of the said contract and promise in this plea and in the said last count above mentioned, and at the time of the said doing

the said work and providing the said materials, and so selling and delivering, depositing, appropriating, and using the said plans, sections, and books of reference, and so paying the said money, and so stating the said accounts respectively, contrary to the statute.—Verification.

Special demurrer, on the ground that the plea amounted to the general issue. The defendants gave notice that they should contend that the plea was also bad in substance.

Quain argued in support of the demurrer (Jan. 17).—The plea is bad. If it affords any answer to the count to which it is pleaded, it is open to the objection that it amounts to the general issue. Assuming that the defendants are bound by the contract upon which the last count is founded, the plea affords no answer to it; but if they are not bound personally, it is merely a denial that they entered into that contract. The plea, in effect, states that the parties entered into a contract, but not into *the* contract mentioned in the last count, and it does not sufficiently admit the contracts to be identical: *Rayner v. Wright (a)*.—[*Pollock*, C. B.—It will be contended on the part of the defendants that the contract to which the plea is directed is prohibited by the 23rd section of the 7 & 8 Vict. c. 110 (b),

(a) 3 Q. B. 922.

(b) That section enacts, "That on the provisional registration of any Company being certified by the registrar of Joint-stock Companies, it shall be lawful for the promoters of any Company so registered to act provisionally, but not for any longer period than twelve months from the date of the certificate, unless such certificate shall be renewed, which may be done on application for that purpose; and no such re-

newed certificate shall be in force for a longer period than twelve months from the date thereof; and it shall be lawful for the promoters of such Company—

"To assume the name of the intended Company, but coupled with the words 'Registered provisionally;' and also,

"To open subscription lists; and also,

"To allot shares, and receive deposits by way of earnest thereon, at a rate not exceeding ten

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and is therefore illegal and void, and consequently this defence is properly pleaded by way of confession and avoidance. *Parke, B.*—If contracts of this nature are forbidden by this statute, the plea admits a contract in fact, but avoids it by shewing that it is not binding in law.] The plea does not bring the case within the 23rd section, for it does not allege with sufficient certainty that the subject-matter of the contract mentioned in the last count is of the same character as those matters which are specified in the 23rd section; neither does it sufficiently state that, at the time the debt arose, the defendants' Company was not completely registered. The statute does not preclude parties from being personally bound, and it does not render contracts between the promoters of a Company and mere

shillings for every one hundred pounds on the amount of every share in the capital of the intended Company; and also, in the case of Companies for executing any bridge, road, cut, canal, reservoir, aqueduct, water-work, navigation, tunnel, archway, railway, pier, port, harbour, ferry, or dock, which cannot be carried into execution without the authority of Parliament, in addition to and exclusive of such sum of ten shillings per hundred pounds, such further sum per hundred pounds on the amount of every such share as may be required by the standing orders of either House of Parliament to be deposited before the obtaining of an Act of Parliament for enabling the Company to execute such work; and also,

“To perform such other acts only as are necessary for constituting the Company, or for ob-

taining letters patent, or a charter, or an Act of Parliament. But not to make calls, nor to purchase, contract for, or hold lands, nor to enter into contracts for any services, or for the execution of any works, or for the supply of any stores, except such services and stores or other things as are necessarily required for the establishing of the Company, and except any purchase or other contract to be made conditional on the completion of the Company, and to take effect after the certificate of complete registration, Act of Parliament, or charter, or letters patent shall have been obtained; and, except in the case of Companies for executing such works as aforesaid, contracts for services in making surveys and performing all other acts necessary for obtaining an Act of incorporation or other Act for enabling the Company to execute such works.”

strangers to it illegal; and even upon the supposition that the defendants are not personally bound, the plea merely denies their liability, and therefore amounts to the general issue; for in such case the defence rests upon the ground that the defendants acted as the agents of the Company, and had no authority to enter into the contract. The case is similar to that of *Jenkins v. Hutchinson* (a). [*Parke, B.*, referred to *Jones v. Downman* (b), and *Lewis v. Nicholson* (c).] The statute, at the most, merely enacts that the promoters of these undertakings, who do not personally enter into contracts, shall not be bound by the acts of their fellow promoters, and it exempts them from all liability in such cases.

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Rochfort Clarke contra.—The 23rd section of the statute absolutely prohibits and renders void all those acts against which that enactment is directed. The plea brings the cause of action mentioned in the last count within that section, and affords a good and substantial defence to the claim, and discloses a defence of which the defendants could not have availed themselves under the general issue. It therefore shews the contract to be illegal and void. The recital to the 1st section of the Act shews what was the intention of the legislature in passing the Act. That section recites, amongst other things, that it is expedient “to prevent the establishment of any Companies which shall not be duly constituted and regulated according to the provisions of this Act.” All acts of the promoters, unless done in obedience to the provisions of the statute, are void. By the 3rd section, “the expression ‘promoter,’ or ‘promoter of a Company,’” is “to apply to every person acting, by whatever name, in the forming and establishing of a Company, at any period prior to the Company obtaining a certificate of complete registration as hereinafter mentioned.” The plea states that the defendants entered into the contract as promoters, and that the Company never was com-

(a) 13 Q. B. 744. (b) 4 Q. B. 235. (c) 21 L. J., Q. B., 311.

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pletely registered, and that the plaintiffs knew those facts. The plaintiffs ought to have replied that they did not contract as promoters of the Company but in their individual capacity, if such was indeed the fact. [*Martin, B.*—The 4th section requires certain returns to be made by the promoters of these Companies; and the 5th section imposes a penalty in case of delay in the registration of such particulars. The 14th section also imposes a penalty of 25*l.* in certain cases; but the 23rd section, upon which the defendants rely, does not contain any such provision.] The 23rd section shews the policy of the Act, which was passed to prevent the formation of these Companies, unless they comply with the statutory requisites imposed upon them. The language of *Sir William Grant*, in speaking of the public policy of the Ship Registry Acts, 26 Geo. 3, c. 60, and the 34 Geo. 3, c. 68, in *Mestaer v. Gillespie* (a), is applicable to the present Act. He there said:—"It is to be considered that this Act was framed, not for the purpose of ascertaining the rights of parties against each other, or protecting them from fraud, but with a view to a great purpose of public policy. And the Act, in all its provisions, compels them to observe regulations, not in any degree requisite for their own private interests, in order to accomplish the ends of the Act." The statute therefore prohibits the act, and the matter is properly made the subject of a special plea: Reg. Gen. Hil. Term, 4 Will. 4, *Potts v. Sparrow* (b), *Martin v. Smith* (c), and *Varney v. Hickman* (d).

Quain, in reply, contended that the omission, in the 23rd section, of a provision imposing a penalty, shewed that that section was not prohibitive in its character; and that, as no indictment would lie against a promoter of a Company for entering into such a contract, it was not illegal.

Cur. adv. vult.

(a) 11 Ves. 642.

(b) 1 Bing. N. C. 594.

(c) 4 Bing. N. C. 436.

(d) 5 C. B. 271.

PARKE, B. (After stating the pleadings, his Lordship proceeded)—It was contended that the plea is bad, inasmuch as the acts to which it is pleaded are not prohibited by the 7 & 8 Vict. c. 110, and that the plea at the best amounts to the general issue. Now, if such acts are not absolutely prohibited, the plea would amount to the general issue, because it would mean simply that the defendants had no authority to bind their principals to the contract mentioned in that plea and in the last count of the declaration. But if, on the other hand, the acts are positively prohibited by this statute, the contract would be illegal and void, and the plea would not be open to the objection of amounting to the general issue. On reference to the language of the 23rd section, and adopting the ordinary rule of construction, we are of opinion that the Act makes the contract illegal. By that section, it is lawful for the promoters of such a Company, after provisional registration being duly certified, to assume the name of the Company coupled with the terms "provisionally registered," to open subscription lists, to allot shares, and so on, and to perform other acts, but such only as are necessary for constituting the Company, or for obtaining letters patent, or a charter, or an Act of Parliament. But they are not to make calls, nor to purchase or contract for or hold lands, nor to enter into contracts for any services or for the execution of any works. Such acts are positively forbidden by this section, and, being so, they are illegal. The plea is therefore good in form, and affords a substantial answer to the count to which it is pleaded. Our judgment will, therefore, be for the defendants.

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Judgment for the defendants.

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In debt for not setting out tithe, it appeared that the plaintiff, who was vicar of Prestbury, claimed hay-tithe in four townships of that parish, viz. Titherington, Upton, Fallibroome, and Siddington. No endowment was produced; but the plaintiff gave in evidence a series of terriers from the year 1634 to 1789, all of which stated that the tithe of corn and hay within these townships belonged to the vicar. Most of these terriers were signed by the vicar and churchwardens, and some by the steward of the lay rector. The rector had not taken hay-tithe in any of these town-

ships, and the vicar had uniformly taken corn-tithe in all, and he had taken hay-tithe in the three first. In the year 1808, the then vicar having claimed hay-tithe in Siddington, the parishioners disputed his right, and there was a meeting of the township on the subject, after which some payments were made; but there was conflicting evidence as to whether these payments were made unconditionally, or subject to the opinion of counsel as to the vicar's right to hay-tithe. The plaintiff also proved that, the tithe of the township being about to be commuted, the vicar and an agent of the landholders attended before the tithe commissioner, when the former claimed the tithe of corn and hay within these townships, and the latter requested a separate assessment: the rector made no claim. This evidence was objected to, but admitted by the learned Judge. The defendant claimed a total exemption by reason of nonpayment for the period prescribed by the 2 & 3 Will. 4, c. 100.:—*Held*, first, that the evidence objected to was properly received, inasmuch as it was applicable to the question of a total exemption by reason of nonpayment, no such claim to exemption having been set up before the tithe commissioner.

Secondly, that there was sufficient evidence that the rector had endowed the vicar with the hay-tithe of the township of Siddington.

Thirdly, that the defendant had not made out an exemption by nonpayment for the statutable period; for, although immemorial nonpayment may be inferred from nonpayment for thirty or forty years, no such inference can arise with respect to the statutable limitation; but in such case an exemption for the entire period must be strictly proved.

DEBT on the statute 2 & 3 Edw. 6, c. 13, s. 1.—The first count of the declaration stated, that the plaintiff was the vicar of the parish of Prestbury in the county of Chester, and proprietor of the tithes of hay yearly arising, growing, renewing, and happening in, upon, and from divers acres of land, situate in the township of Titherington in the said parish of Prestbury, and within the bounds, limits, and titheable places of the same township and parish; and that the defendant, during all the time aforesaid, was the occupier of the said land. That all and singular the tithes of hay, yearly arising, growing &c. in, upon, and from the said land within forty years next before and at the time of the making of a certain Act of Parliament passed in the reign of Edward the 6th, of right ought to have been set out and paid in kind to the farmer or proprietor of those tithes for the time being. And thereupon the defendant, on &c., mowed and cut down certain acres of hay then growing upon the said land, the tithe whereof belonged to the plaintiff, and of right ought to have been set out and paid to him as such vicar and proprietor as aforesaid: Yet the defendant, after the said mowing and cutting down of the hay, did take and carry the said hay from the said land where the same had so grown and been so mowed and

cut down, and where the same ought to have been tithed, the tenth part of the same or any part thereof not having been separated, divided, or set out from the nine parts residue thereof, nor any composition or agreement made with the plaintiff for the tithe thereof or any part thereof, contrary to the form of the statute, &c.—The declaration then alleged, that the tenth part so taken was of the value of 200*l.*, whereby an action accrued to the plaintiff to recover 600*l.*, the treble value, &c.—There were similar counts in respect of hay-tithe in the townships of Siddington, Upton, and Fallibroome.

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Plea, nil debet, upon which issue was joined.

At the trial, before *Williams, J.*, at the Chester Spring Assizes, 1852, it appeared that the action was brought by order of the Court of Chancery, to try the right of the plaintiff, as vicar of the parish of Prestbury in the county of Chester, to the tithe of hay in the several townships of Titherington, Siddington, Upton, and Fallibroome, in that parish (which contain twenty-eight townships in the whole). The defendant was, for the purpose of the action, admitted to be the occupier of lands within those four townships. The rectory of Prestbury belongs to a lay impropriator. The plaintiff was appointed vicar in 1842, upon the death of one Browne, who had been vicar since the year 1800. No endowment was given in evidence; but the plaintiff produced, from the registry of the Bishop of Chester, a series of terriers, commencing in the year 1634 and going down to the year 1789. These terriers stated, that the tithe of corn and hay within the townships of Siddington, Titherington, Upton, and Fallibroome, belonged to the vicar. Most of these terriers were signed by the vicar and churchwardens, and some by the steward of the lay rector. In these townships, one of the churchwardens was appointed by the lay rector, one by the vicar, and two by the parishioners. The vicar was proved to have received tithe of corn and hay within the townships of Titherington, Upton, and Fallibroome; but there was no evidence of the actual per-

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ception of hay-tithe in the township of Siddington prior to Browne's incumbency, or after the year 1808. The rector had not taken any hay-tithe in any of these four townships, but had always taken it throughout the parish. The plaintiff also tendered evidence to shew that, in the year 1848, which was after the suit in Chancery was instituted, the Tithe Commissioners held a meeting for the purpose of commuting the tithe of the four townships in question, and on that occasion the lay rector made no claim to the tithe of hay or corn within these townships; and that the vicar attended the meeting, and claimed the corn and hay-tithe, and Mr. Parrott, an attorney at Macclesfield, also attended on behalf of the landholders, and claimed for them the small tithe, and requested the Commissioners, in their award, to separate the value of the hay-tithe from the corn-tithe. This evidence was objected to by the defendant's counsel, but received by the learned Judge, who, in his summing up, told the jury that it was entitled to very little weight. On the part of the defendant, several aged inhabitants of Siddington deposed that they had never paid hay-tithe for that township. The defendant also gave in evidence an extract from the "Valor Ecclesiasticus," in which, under the head "Vicarage of Prestbury," was "Tithes of grain, 6*l*," but no mention was made of hay-tithe. The defendant also adduced evidence to shew, that, about the year 1808, Browne, the former vicar, claimed hay-tithe for the township of Siddington. On that occasion there was a meeting of the township, which Browne attended, and offered to accept a composition of 40*l*. a year for the whole township. According to the testimony of some of the witnesses, it was agreed that the money should be paid, and certain payments were made; but other witnesses stated that the payments were only conditional on the opinion of counsel being in favour of the vicar's right to hay-tithe; that Sir *W. D. Evans* was consulted, and his opinion being adverse to the vicar's claim, the parishioners refused to pay any more.

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It was submitted on the part of the defendant, first, that, in the absence of any endowment, there was not sufficient evidence of perception of tithe to establish the vicar's right; secondly, that even if at one time hay-tithe was parcel of the endowment, the lands were now exempt, by reason of their having been held without payment of tithe for the period prescribed by the 2 & 3 Will. 4, c. 100. The learned Judge told the jury, that, though the prescribed period might have elapsed without any payment of tithe, yet if tithe was afterwards paid, that would prevent the operation of the statute; and his Lordship left it to the jury to say, first, whether the plaintiff had established that the vicarage was endowed with hay-tithe of the four townships in question, or of any and which of them; secondly, whether the defendant had established an exemption from hay-tithe by reason of nonpayment for the periods prescribed by the statute. The jury found the first question in the affirmative, and the second in the negative; and a verdict was entered for the plaintiff.

Evans, in the following Term, obtained a rule nisi for a new trial, on the grounds of misdirection, and of the improper reception of evidence.

Whitehurst, Welsby, and Davison, shewed cause in last Trinity Term (a).—First, the evidence as to what took place before the Tithe Commissioners was properly admitted by the learned Judge. Under the 6 & 7 Will. 4, c. 71, s. 45, it is the duty of the Commissioner to adjust the rights of all parties in respect of tithe; and consequently those who either claim tithe or any exemption from it ought to attend before him. The inhabitants of these townships did in fact attend by their agent, and his conduct was evidence against them, on the same principle that the conduct of a party to a suit is admissible.

Then, with respect to the alleged misdirection, it is

(a) June 4, 5, and 9.

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submitted, first, that there was abundant evidence to establish the plaintiff's right to hay-tithe in these four townships. The law presumes that tithe is payable either to the rector or the vicar. But here, there was not only no claim by the rector to hay-tithe within these townships, but it appeared from a long series of terriers, some of them signed by the churchwarden appointed by the rector, and others by the steward of a rector, that the hay-tithe of these townships belonged to the vicar. It was clearly proved that the vicar had received hay-tithe in three of the townships; and since there was conflicting evidence as to whether the payments for Siddington were conditional or not, that was a question for the jury, and they have found it against the defendant.

Lastly, the defendant has failed to shew an exemption by reason of nonpayment for the periods prescribed by the 2 & 3 Will. 4, c. 100. A party who relies on that statute must prove an exemption for the entire statutable period, that is, for every year during two incumbencies amounting to sixty years, and three years of another incumbency: *Earl of Stamford v. Dunbar* (a). It will not avail to prove nonpayment for a portion of the period, and then ask the jury from that to infer nonpayment for the remainder. The same rule prevails as under the Prescription Act, 2 & 3 Will. 4, c. 71: *Parker v. Mitchell* (b), *Flight v. Thomas* (c). But here the last terrier was within a period of sixty years from the time of the plaintiff's claim.

Evans and E. Beavan in support of the rule.—The evidence objected to was improperly received. The transaction to which it related took place after the suit was instituted; and moreover, the defendant is not bound by what a third person may have said at the Commissioners' meeting. [*Alderson*, B.—It is difficult to say that it was not some evidence. The townships attend by their agent, and do not dispute the vicar's claim to tithe, but only ask that

(a) 13 M. & W. 822. (b) 11 A. & E. 788. (c) 11 A. & E. 688.

there shall be separate awards in respect of it. *Pollock*, C. B.—Anything which a party to a suit says or does at any time, is admissible; though, if it be irrelevant, the Judge may reject it. That principle applies here.] Then with respect to the misdirection. *Primâ facie*, tithe belongs to the rector, and the vicar must establish his right, either by endowment or perception. Terriers, unless accompanied by perception, are of very little weight. Here no endowment was proved, nor was there sufficient evidence of perception. The learned Judge omitted to point out to the jury that a conditional payment was, in point of law, no payment. But further, in a claim to exemption under the statute, if nonpayment be proved for forty or fifty years, nonpayment for the whole period may be presumed, as in the case of a claim to exemption by immemorial usage. If not, this consequence would follow, that, in the case of ten incumbencies, nine of which were of five or six years duration, and the other of two or three, though there was actual proof of nonpayment during the whole of that period, the party would fail in shewing an exemption under the statute, while, at the same time, an immemorial claim might be established by evidence of nonpayment for a less period. It seems, from a note to *Salkeld v. Johnston* (a), that a presumption was allowed in that case. Even assuming that the payment in 1808 was unconditional, that would not prevent the operation of the statute, if the prescribed period had previously elapsed.

Cur. adv. vult.

The judgment of the Court was now delivered by

ALDERSON, B.—We think this rule should be discharged. We expressed our opinion at the time of the argument, that there was no ground for a new trial on the improper reception of evidence. That which was received was clearly applicable to one of the two questions left to the jury;

(a) 1 Mac. & G. 248.

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videlicet, to the question of a total exemption by reason of nonpayment. The claim before the Tithe Commissioners, which was the evidence objected to and received, did not allude to this total exemption. That was some, but the very slightest evidence no doubt, that such an exemption was ill founded. The learned Judge received it, but stated to the jury that it was almost of no weight. We think he was right in receiving it, and we agree with him in the direction he gave upon it.

The other question is, as to the misdirection. It is said that there was nothing to leave to the jury as to the vicar's right to hay-tithe in the township of Siddington, and that in leaving it to them the learned Judge misdirected them. Now, if the premises be true, no doubt the conclusion follows. But the premises are not true. We think that there is evidence, and quite sufficient evidence, to justify the verdict in this case. If the case be divided into its two proper branches, we think this will abundantly appear. It is by mixing up the two questions together, which ought to be kept distinct, that the confusion which alone produces the difficulty arises. This is a claim by a vicar for vicarial tithes. Now his right to tithes is derived out of the extent of his endowment by the rector, to whom all the tithes, including those now in question, do of right belong. That, however, is a question only, really, between him and the rector. The parishioners, in this part of the case, are merely setting up the *jus tertii*. This they may no doubt do. But still the question ought to be decided, if justly, as if tried between the rector and the vicar. Let us then so try it, and examine all the evidence as if we were trying a dispute between the rector and the vicar as to these tithes. No endowment is produced. If such an endowment were produced, this part of the case would be at an end. Nonpayment of tithes would then have no place in such a question, for the non-perception of the tithes is, in all these cases, only evidence as to the extent of the endowment by the rector,

and if you have that in writing, such evidence becomes immaterial. Now, what is here the evidence of the endowment? In the first place, there is a regular series of terriers, beginning in 1634 and going down to 1789. These are not one or two at long intervals, but numerous and continuous. They are nearly uniform. They all state that the vicar has the tithes of corn and hay within the four townships of Titherington, Upton, Fallibroome, and Siddington, within the parish of Prestbury, and not within the other townships of that parish. Within the parish the rector, who is a lay rector, appoints one churchwarden, and this churchwarden signs several of these terriers. The acting agent of the lay rector also signs some of them. The admitted fact is, that the lay rector has not taken hay-tithe in any of these four townships. The vicar has taken corn-tithe uniformly, and without dispute. He has taken some hay-tithe in the three first townships, and as to Siddington claimed it. Now, as to this claim, a parish meeting was called thirty years ago. The parishioners disputed his right. Now this, it is to be observed, was before Lord Tenterden's Act. The dispute must, therefore, have had no relation to exemption, but only to endowment, for exemption as now set up did not then exist. As to this claim there is contradictory evidence. All agree that payments were made; some, no doubt, say conditionally only on their taking Sir *W. D. Evans's* opinion as to the vicar's right; and that, after that opinion was given, they paid to him no more. One, whom the learned Judge calls a most respectable and trustworthy witness, and whom the jury believed, stated that he paid unconditionally; and even after this supposed opinion of Sir *W. D. Evans* (which we are to take almost on trust, without the case being produced or any knowledge of the facts stated to him), we still find no claim or receipt of hay-tithe in Siddington by the lay rector.

Now, on the question of endowment, if a jury were asked

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whether they thought that the rector had endowed the vicar with hay-tithe in Siddington, as well as in the three townships named in the terriers, the parishioners being ready and willing to pay to the one or the other according to the verdict, which is the true view of the case, must not every one acknowledge not only that there is evidence, but that the evidence greatly preponderates, in favour of the hay-tithe belonging to the vicar and not to the rector? and if so, there is a sufficient endowment in this case. But it is enough that there is some evidence of it (this issue being no doubt on the vicar) for the jury to consider.

We come now to the second branch of the case. Here the issue is on the defendant. He is to make out an exemption by nonpayment of hay-tithe for sixty years. This must be strictly made out. It will not do to give evidence of nonpayment for fifty years, and ask the jury to infer nonpayment for sixty years. There must be some evidence of nonpayment which extends to or exceeds sixty years. No doubt, a nonpayment sixty-two years before, and a continued nonpayment for forty years, would do, but there must be some actual evidence to carry it to or beyond the statutable period. It may seem strange, that, when you may infer, as undoubtedly you may, immemorial nonpayment from nonpayment for thirty or forty years, you cannot infer the statutable period, which is less. But this is only a difficulty on the surface. If you set up immemorial nonpayment, you subject yourself to the hazard of its being broken in upon by a payment eighty years before. But the statutable limitation is exempt from that risk, and is therefore not unreasonably subjected to a stricter proof. A statutable limitation must be proved according to the terms of the statute. Now, that being so, what is the proof which the defendant must give? Here, the first question as to the extent of the endowment being made out, we are to take it that the vicar has been endowed by the rector with the tithe of hay, which, of

common right, originally belonged to the rector. The parishioners say they are exempt from this tithe of hay altogether. This, properly translated, is an assertion that neither vicar nor rector have ever taken it, or had their right admitted by the parishioners, for sixty years. Now, trying the evidence by this test, and even admitting the defendant's version of the parish meeting thirty years ago, which the jury did not adopt, to be correct, we have payments made on the plain footing that hay-tithe was due, as the defendant contended to the rector, as the plaintiff says to the vicar, but as both agree to the church.

Here then is a clear payment thirty years ago; and any exemption from nonpayment for sixty years is actually negatived. That this was at the trial sought to be put on the part of the defendant as a proof of exemption, must have arisen, we presume, from a forgetfulness that the case stated to Sir *W. D. Evans* was stated at a time when no such question of exemption from mere nonpayment could be stated; and when the case must virtually have been, if not in terms, this:—"We the parishioners being liable, as we admit, to pay hay-tithes to the church, say we ought to pay them to the rector not to the vicar, who has never been endowed with them: we are ready to pay them to the one to whom they are due, and have paid them accordingly for the present to the vicar, subject to your decision whether they were really included within the endowment made in his favour by the rector." If this had been so stated in terms, it would have been impossible to set this up as evidence of any total exemption from hay-tithe. It was indeed some evidence, and so we have stated it, of the want of endowment of hay-tithe, that Sir *W. D. Evans* gave his opinion under the circumstances stated to him, which, however, may have been very different from those laid now before us. If, indeed, he had had before him all the evidence we have now, we cannot believe that he could have arrived at such a conclusion upon the extent of the vicar's endow-

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ment. Whether he did so or not, is not however very material. The evidence of the endowment is, in our judgment, almost conclusive, and certainly is not at all balanced by this transaction, which took place thirty years ago, and which is all that can be set against it now. When properly considered, in our judgment this transaction is quite fatal to the exemption; and, even taking, which we ought not to do (because there was contradictory evidence, and that evidence believed by the jury), the defendant's version of it, we think that the proof of the exemption fails. It was never set up before the Tithe Commissioners, and probably was never thought of till the case got into the Court of Chancery. We think therefore that, as to Siddington, the Judge did not misdirect, and that the jury found the right verdict. As to the other three townships the verdict is confessedly indisputable.

Rule discharged (a).

(a) At the trial of the cause, the verdict was taken for the plaintiff for 51*l.* (with a view of avoiding any possible question as to the jurisdiction of the county court). In Hilary Vacation, after the costs had been taxed, the defendant made an application to *Platt*, B., at Chambers, to amend the record, by striking out the adjudication of costs to the plaintiff, on the ground that, under the 2 & 3 Edw. 6, c. 13, and the 8 & 9 Will. 3, c. 11, the plaintiff was not entitled to recover any costs, the damages recovered by him exceeding the sum of 20*l.*, and the single value found by the jury, therefore, exceeding twenty nobles (6*l.* 13*s.* 4*d.*) The learned Judge declined to

make the order asked for, but made an order staying the proceedings until the fifth day of Easter Term, in order to enable the parties to apply to the Court. On the first day of that Term, the plaintiff took out a summons before *Williams*, J., to amend the record, by reducing the sum of 51*l.* to the sum of 5*l.*, on the ground that, the verdict having been taken for 51*l.* as a nominal amount, without objection, and no question as to the *value* of the tithes having been in contest at the trial, or submitted to or found by the jury, it would be unjust that the plaintiff should be prejudiced in respect to his right to costs by a proceeding of this kind, which had been adopted

only for the purpose of excluding any question as to his right to costs. For the defendant it was urged, that the learned Judge had no authority now to make the amendment; that the plaintiff was bound by the amount of damages which he had thought

fit to claim at the trial; and that, in fact, evidence was given of payment of hay-tithe to an amount beyond twenty nobles. The learned Judge, however, after conferring with the Court of Exchequer, made the amendment prayed.

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THIS was an action of trespass for an assault upon and imprisonment of the plaintiff. The defendants pleaded not guilty by statute.

The plaintiff, a resident inhabitant of the parish of W. in the county of Hertford, was

summoned to appear at the Shire Hall of the county before the defendants, who were appointed justices of the county under a commission, which gave them authority to act as such as well within the liberty of St. Alban as without, to answer a charge of assault committed by him within the liberty. The plaintiff, not having appeared to the summons, was convicted in a penalty with costs, under the 9 Geo. 4, c. 31; and the same not having been paid, he was committed by the defendants to the liberty house of correction. By a charter of Edward 4, the king granted to the abbots of St. Alban the right to appoint their own justices of the peace within the liberty; and the charter contained a non-intromittant clause prohibiting all other justices from in any way interfering with the justices so appointed. By the statute 27 Hen. 8, c. 24, s. 2, the power of all grants of liberties to make justices was put an end to; and it was thereby enacted, that, for the future, all such justices should be made by letters patent under the Great Seal. The 17th section of that Act provided that all justices of the peace thereafter to be made by the Crown should sit and hold their sessions in the same places as the justices of the liberties commonly used; and that no person or persons within the said liberties, or any of them, should thereafter in any wise be compelled by authority of that Act to appear out of the said liberties before any other justices of assize, gaol delivery, or of the peace, than before such justices as should be named and assigned to sit and be by the king within the said liberties, &c. By the 31 Hen. 8, c. 18, An Act for Dissolution of Monasteries and Abbeys, it was enacted that all monasteries and abbeys, and also the courts, liberties, and privileges belonging to the same, should be vested in the king. By the 32 Hen. 8, c. 20, after reciting that the liberties, &c., of divers monasteries had been assigned to the king's Court of Augmentations, and that it had not been fully declared in what wise the liberties, privileges, and franchises which the late owners of the same sites had, used, and exercised, should be used and exercised, it was enacted that such liberties, privileges, &c., which the late owners had, used, and exercised three months next before the said sites, &c., came to the king, should be revived in the king, and that the same liberties, &c., should be used and exercised by such stewards, &c., or other officers, as the king might appoint, in like manner as they were lawfully exercised by the ministers before they came to the hands of the king. By charter of 9 Jac. 1, the king granted to G. W. and T. W. all that our liberty to the late monastery of St. Alban, with all and singular its rights &c., in so ample a manner and form as any abbot, &c., of any late abbey ever had, held, used, or enjoyed. The premises contained in the said charter descended to the present Marquis of S. By the 27 Geo. 3, c. 11, it is provided, that it shall be lawful for any justice or justices of the peace, within his or their respective jurisdictions, to commit either to the common gaol or to any house of correction within his or their respective jurisdictions, as to such justice or justices shall seem most proper, such vagrants and other criminals,

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The cause came on for trial before Lord *Denman*, C. J., at the Hertfordshire Spring Assizes, 1848, when a verdict was found for the plaintiff with 500*l.* damages, subject to the opinion of the Court upon a special case, which, in substance, was as follows:—The defendants were two of her Majesty's justices of the peace for the county of Hertford, and also for the liberty of St. Alban, in the same county. The plaintiff was a resident inhabitant of the parish of Wethamsted in the said county, which parish is not in the liberty of St. Alban. On the 16th of August, 1845, the plaintiff was summoned to appear on the 23rd of August then instant, at the Shire Hall, in the town of Hertford in the county of Hertford, and out of the liberty of St. Alban, before the defendants, to answer a charge of assault upon one Thomas Wakefield, committed at the parish of Sandridge in the liberty of St. Alban in the county of Hertford. The plaintiff did not appear according to the exigency of that summons; and on proof of due service thereof, the defendants, in the absence of the plaintiff, on the 23rd of August, 1845, at the Shire Hall in the town of Hertford, and out of the liberty of St. Alban, heard the evidence in support of the charge, and then and there, for the assault so committed within the said liberty, convicted the plaintiff in a penalty of 2*l.* 18*s.*, and a further sum of 1*l.* 6*d.* for costs; which fine and costs not having been paid immediately after such conviction, the defendants, on the same day, before any notice of it had been given to the plaintiff, or demand made of such penalty and costs, committed him to prison under a commitment signed and sealed by them on the 23rd of August, at the

offenders, and persons charged with or convicted of small offences, as by any law now in force or hereafter to be made, he or they is or are or shall be authorised to commit to the common gaol:—*Held*, that the justices for the liberty had not exclusive jurisdiction within the liberty; and that, therefore, the defendants, who were appointed justices for the county under the commission which gave them authority to act as such within the liberty as well as without, had jurisdiction over the offence with which the plaintiff was charged, though committed within the liberty.

Held, also, that, as the liberty house of correction was locally situate within the defendants' jurisdiction, they were empowered to commit the plaintiff to it.

Shire Hall. The proceedings were under the 9 Geo. 4, c. 31, ss. 27, 33. The warrant of commitment, which was set out, recited the conviction, and that the defendants had directed that the penalty should be paid to one of the overseers of the poor of the parish of Sandridge, in which the offence was committed, and that the plaintiff had made default in payment of the penalty and costs. It then required the constables of the county of Hertford to apprehend and convey the plaintiff to the House of Correction at St. Alban's, and to deliver him to the keeper thereof. Under this commitment, and in obedience to it, the plaintiff was arrested and taken to the common gaol at St. Alban's, in the liberty of St. Alban in the said county, and was there imprisoned for the space of six weeks. The conviction (which was set out in the case) was drawn up according to the form of the 9 Geo. 4, c. 31, s. 35. Due notice of action was given to the defendants before the present action was commenced.

The liberty of St. Alban was originally created by a charter of Henry 1 to Geoffrey de Gorham, the 16th Abbot.

Various privileges were by that and subsequent charters conferred on the liberty; and Edward 4, by charter (a),

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(a) Those portions of the charter which are material to the present case are as follows:

"Concessimus etiam eisdem Abbati et Conventui quod ipsi et successores sui per litteras suas patentes facere possint constituere et assignare imperpetuum infra villas hundredum et libertatem predictam justiciarios suos ad pacem infra eadem conservandum et ad omnimodas felonias transgressiones et malefacta infra villas hundredum et libertatem predictam contingentia sive

emergentia audiendum et terminandum qui quidem justiciarii super eos assignandi easdem habeant potestatem et auctoritatem infra villas hundredum et libertatem predictam in omnibus et per omnia quales habent aliqui justiciarii pacis in comitatu Hertfordie aut in aliquo alio comitatu regni nostri Anglie ita quod nec justiciarii nostri ad pacem in comitatu predicto nec aliqui alii justiciarii dicti regni nostri nisi tantummodo justiciarii per dictos Abbatem et Conven-

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granted to the abbot and convent the right of appointing their own justices of the peace, with power to them to hear and determine all felonies, trespasses, and misdemeanors committed within the said town, hundred, and liberty, and prohibited justices of the peace of the county of Hertford and all other justices in the kingdom from interfering with their jurisdiction. The charter also granted to the abbot and convent the right of having a common gaol

tum seu successores suos ut premititur assignandi aliquam cessionem infra villas hundredum seu libertatem predictam facere nec de aliquo infra eadem villas hundredum seu libertatem faciendo concernando seu emergendo inquirant nec se inde in aliquo intromittant nec eorum aliquis intromittat Quodque habeant iidem Abbas et Conventus et successores sui predicti gaolam infra villam de Sancto Albano predicto ad felones et alios malefactores quoscumque infra villas hundredum et libertatem predictam captos seu capiendos in eadem gaolâ quousque ab eadem secundum legem et consuetudinem regni nostri Anglie deliberantur salvo custodiendum Et quod senescallus eorundem Abbatis et Conventus et successorum suorum associatis sibi uno vel duobus legis perito vel legis peritis quorum predictus senescallus pro tempore existens semper sit unus sint iusticiarii nostri et heredum nostrorum ad gaolam illam de prisonariis in eâ existentibus et eidem prisone ex quâcumque causâ committendis de tempore in tempore deliberan-

dum Ita quod nullus iusticiarius noster sive iusticiarii nostri vel heredum nostrorum ad gaolam illam aliquo modo deliberandum per nos vel heredes nostros de cetero assignandi villas hundredum seu libertatem predictam ex hac causâ vel aliâ causâ quâcumque aliquo modo ingrediatur seu ingrediatur et quod ballivus eorundem Abbatis et Conventus et successorum suorum libertatis predictæ pro tempore existens omnia juratas penella inquisitiones attachiamenta et intendencias prefato iusticiario ac senescallo vel duobus eorum ut predictum est iusticiariis ad gaolam illam deliberandum assignandis de tempore in tempus faciat retornet et intendat ac precepta mandata warranta et judicia eorundem iusticiarii et senescalli vel duorum eorum pro tempore existentium ut predictum est faciat et exequatur in omnibus eisdem modo et forma prout aliquis vicecomes regni nostri Anglie huiusmodi iusticiarius ad gaolas ejusdem regni nostri deliberandis assignatis facit retornat intendit et exequitur quovis modo."

within the town of St. Alban, and excluded all other justices from delivering such gaol.

By the 2nd section of the 27 Hen. 8, c. 24, intituled "An Act for recontinuing Liberties in the Crown," it was enacted, that no person should thenceforth have any power to make justices of the peace, and that such justices should be made only by the authority of the King and his heirs, &c., and by letters patent under the King's Great Seal (a).

(a) The 16th section of the 27 Hen. 8, c. 24, enacts, "That all such justices to be made as is afore-rehearsed in this Act, shall have authority and power to keep and hold their sessions of peace, and to deliver the same gaols from time to time only within the same liberties and franchises, and in such places, and in none other places, by reason and authority of that commission, and to do and execute all other things within the same, in as ample and large manner as any other justices of peace and gaol delivery in any shire within this realm may do, and have authority to do; any act, grant, use, custom, and allowance, heretofore had, made, or used, or any article in this present Act made to the contrary notwithstanding."

Sect. 17 provides, "That all and singular justices of the peace, gaol delivery, and assize, hereafter to be made, named, and appointed by the king's highness, his heirs and successors, within any liberty, where any such justice of peace, gaol delivery, or assize, or any of them, have been made by any person or persons by virtue or authority of

any letters patent of the gift or grant of our sovereign lord the king, or his most noble progenitors, kings of this realm, or otherwise, shall sit and keep their sessions, gaol delivery, and assizes, only in such place and places as the justices of the said liberties lately have commonly used within the said liberties: And that no person or persons within the said liberties, or any of them, shall be hereafter in anywise compelled by authority of this Act to appear out of the said liberties before any other justices of assize, gaol delivery, or of the peace, than before such justices as shall be named and assigned to sit and be by the king's highness, his heirs and successors, within the said liberties in form abovesaid: And that this Act shall not extend, or be expounded or taken to any other liberty, privilege, or franchise, granted, used, or had, to any person or persons, other than before in this present Act is expressed and plainly declared and rehearsed, anything in this Act to the contrary notwithstanding, and as if this Act had never been made."

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By the 31 Hen. 8, c. 13, intituled "An Act for Dissolution of Monasteries and Abbies," it was enacted that all monasteries, abbies, &c. which should thereafter come to the King's highness, and also the courts, liberties, privileges, and franchises &c. belonging to the same, should be vested in the very actual and real seisin and possession of the King, his heirs and successors, for ever.

Section 4 enacted that the order, survey, and governance of dissolved abbies and monasteries be appointed in the Court of Augmentations of the revenues of the Crown.

On the 5th of December, A. D. 1539, the monastery of St. Alban was in due form surrendered into the hands of the King.

The 32 Hen. 8, c. 20, "Concerning Privileges and Franchises," after reciting that divers sites, circuits, and precincts of late monasteries, &c., and divers honours, &c., liberties, privileges, franchises, and other hereditaments, by divers statutes had been assigned, limited, and appointed to the order of the King's Court of Augmentations, by which statutes it was not fully declared how and in what wise, and by what special officers, &c. the liberties, privileges, and franchises, which the late owners of the same sites, &c. had, used, and exercised, should be ordered, used, exercised, and put in execution:—by section 1, enacts, that all and singular the same liberties, privileges, franchises, and temporal jurisdictions, which the said late owners had, used, and exercised lawfully, by themselves, or by their officers or ministers, or might have used or exercised, within three months next before the said sites, &c. came to the possession of the King, should be by virtue of that Act revived, and be really and actually in the King, his heirs and successors, and should be in the rule, order, survey, and governance of the said Court of Augmentations, and that the same liberties, franchises, privileges, and temporal jurisdictions, &c. should be used, exercised, and occupied, to all intents, purposes, conditions, and re-

spects, &c., by such stewards, bailiffs, and other officers and ministers as should please the King's highness to name and appoint, in like manner, form, fashion, and condition, as they or any of them were lawfully used, exercised, executed, claimed, &c. before that they came to the hands and possession of the King; and that the same stewards, &c. should account for the revenues in the Court of Augmentations, &c. By sect. 3 it is enacted, that the said stewards, bailiffs, and other officers and ministers shall be attendant and obedient to all other the King's Courts, as well for all executions and returns of writs, warrants, and precepts, as for their personal appearances and other duties of their offices, like as the officers and ministers of the said late owners did and ought to do, or should have done, by reason of their said several offices, before that the same liberties, privileges, and temporal jurisdictions did come to the possession of the King, &c.; and that no sheriff, undersheriff, nor other officer or minister of any sheriff or other foreign officer or minister, should in anywise intronit or meddle in, with, or upon any of the premises, otherwise or in any other manner, nor for any other cause, than they or any of them lawfully might have done before the same premises did come to the possession of the King.

By a charter of 9 James 1, his then Majesty granted to George Whitmore and Thomas Whitmore, esquires, their heirs and assigns for ever (inter alia), "all that our Hundred of Cashio, with all and singular its rights, members, liberties, and appurtenances whatsoever, arising, increasing, renewing, happening, or belonging, in or within the liberty of St. Alban in the county of Hertford, and the office of hundredor there, with the appurtenances; and also all that our liberty to the late monastery of St. Alban appertaining, relating, incident, or belonging, in our counties of Hertford, Bedford, and Buckingham, or any of them, with all and singular its rights, members, and appurtenances whatsoever, as and so fully, freely, and perfectly,

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and in so ample a manner and form as any abbot or prior &c. of any late monastery, abbey, or priory &c., or any other or others, at any time theretofore having, possessing, or seised of the aforesaid hundreds, liberties, &c., and other their premises, with their appurtenances, or any part thereof, ever had, held, used, or enjoyed, or ought to have had, held, used, or enjoyed, in or within the aforesaid hundreds, liberties, &c., and other the premises by the said letters patent granted, or in or within any part thereof, by reason or pretext of any charter, gift, grant, or confirmation, or any letters patent by us or any of our progenitors or predecessors, late Kings or Queens of England, theretofore had, done, or granted or confirmed, or by reason or pretext of any Act or Acts of Parliament, and so fully, freely, and perfectly, and in so ample a manner and form, as we or any of our progenitors and predecessors, late Kings or Queens of England, the aforesaid hundreds, liberties, and other the premises or any part or parcel thereof, had and enjoyed, or ought to have had and enjoyed."

The premises comprised in the last-mentioned charter were, shortly after the date thereof, conveyed by the Whitmores to the then Earl of Salisbury, and from him they have descended to the present Marquis of Salisbury.

There are and always have been separate commissions of the peace for the county of Hertford and for the liberty of St. Alban. The justices appointed under the county commission during all such time were authorised generally to keep the peace in the said county of Hertford; and the commission contains these words—"as well within liberties as without;" and those appointed under the liberty commission were authorised generally to keep the peace within the liberty.

There was also appointed exclusively for the liberty of St. Alban a *custos rotulorum* and clerk of the peace. But the coroner is not distinct, the county coroner acting in

the liberty; but all inquests in the liberty are paid for out of the liberty rates. And quarter sessions of the peace were, during all such time as last aforesaid, regularly holden at St. Alban in and for the liberty; at which appeals against orders &c. of the liberty justices were heard and determined; and at which prisoners committed for trial or held to bail by the liberty justices for felonies, misdemeanors, &c., committed within the liberty, were indicted and tried; and the jurors, who were empannelled at such quarter sessions, were summoned by the Marquis of Salisbury, by virtue of his office of hundredor, solely from within the limits of the said liberty, and under different qualifications from jurors for the county. The liberty, during all the time last aforesaid, claims to have had a gaol delivery belonging to itself in addition to its quarter sessions. A separate and distinct rate in the nature of a county rate, during all the time last aforesaid, has for all purposes been made and levied within the liberty of St. Alban; and no part of the liberty has, during any part of the time last aforesaid, in any way contributed towards the county rate for the county of Hertford, which during all that time has been raised entirely from such part of the county of Hertford as is not within the limits of the liberty. The liberty denies its liability for the maintenance of prisoners confined in the county gaol for liberty offences triable at the assizes, either before or after trial; but, by arrangement and under protest, they have for a few years past paid out of the liberty rate those expenses, as well as the expenses of prosecuting such offenders.

The house of correction at St. Alban's, in which the plaintiff was imprisoned, is not used as a gaol or house of correction for the whole county of Hertford. It is entirely supported out of rates raised in the liberty. [The case also contained entries from the minutes of the County Quarter Sessions; but as they were not referred to on the argument of the case, they are omitted.]

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The Court were to be at liberty to draw any inference of fact which a jury might.

The question for the opinion of the Court was, whether, under the circumstances above set forth, the plaintiff was entitled to recover in this action against the defendants.

If the Court should be of opinion that he was, then the amount of damages was to be referred to arbitration; but if the Court should be of a contrary opinion, then the verdict found for the plaintiff was to be set aside, and a nonsuit entered.

The case was argued in the preceding Term (Jan. 19) by

Willes (*Hawkins* with him) for the plaintiff.—The case presents two questions for the opinion of the Court: First, whether the defendants, as justices for the county, had jurisdiction in the matter; and secondly, if they had, whether they had power to commit the plaintiff to the liberty gaol.

First: The assault was committed within the liberty by the plaintiff, who resided out of its limits. The defendants, who are stated to have been justices for the county and also for the liberty, but sitting in the county and out of the liberty, committed the plaintiff to prison. Now, the description of their character, as being justices for the liberty, is immaterial; for, as liberty justices, they could not act out of the liberty. They must, therefore, be considered in their character of county justices only; and the question is simply, whether the defendants, as such county justices, had jurisdiction here. The reasons against such jurisdiction are few and simple. By the charter of Edward 4, very peculiar powers were granted to the abbots of St. Alban, and, amongst others, the power of appointing their own justices of the peace. But, by the 27 Hen. 8, c. 24, s. 2, the power of making justices was taken away from all private individuals, and was vested in the sovereign.

It appears from a reported decision which occurred before the passing of that statute, that the interference of a county justice in matters within the liberty was illegal. "Where the grant is that the abbot of St. Alban shall make justices of peace there, and that the other justices of the county shall not intermeddle, there the justices of the county are restrained, so that they cannot intermeddle of things within the franchise, and if they do, it is coram non iudice:" Vin. Abr. "Justices of Peace" (D) pl. 1, citing 20 H. 7, 6, 8, per *Fineux*, Ch. And Viner has the following marginal note to that case:—"And the grant was, that the justices of the franchise should have the like authority as the justices of the county of Hertford; and per *Fineux*, such general grant, referring to a certainty as above, is good in the case of the king." Whether this be correct or not is not material here, as the plaintiff relies upon the 27 Hen. 8, c. 24, which makes a special law applicable to liberties of this description. By the 17th section, it is expressly enacted, that all justices to be appointed within any liberty shall sit within the liberty; and that no person within the liberty shall be compelled to appear out of the liberty before any other justice. It appears, from the facts set forth at the close of the case, that the liberty of St. Alban falls within that description of liberty which is contemplated by the 27 Hen. 8, c. 24. A distinct rate, in the nature of a county rate, was levied within the liberty. By the 13 Geo. 2, c. 18, s. 6, referring to the 12 Geo. 2, c. 29, as to the mode of collecting rates, justices of the peace for liberties, "which have commissions of the peace within themselves, and are not subject to the jurisdictions of the commissions of the peace for the counties in which such liberties lie," had the same power granted to them in collecting rates as the justices for the county had in collecting county rates.

Secondly, assuming the defendants to have had jurisdiction to hear the case, they had no power to commit the

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plaintiff to the house of correction of the liberty of St. Alban. The 27th section of the 9 Geo. 4, c. 31, by which persons committing a common assault may be fined by the justices, empowers the justices, in case of the nonpayment of the fine, to commit the offender "to the common gaol or house of correction." By this was intended the gaol or house of correction of the place within the jurisdiction in which the justices are acting. It would be an act of injustice to impose expenses properly belonging to the county upon the inhabitants of the liberty. In *Bla. Com.* by Stephens, vol. 3, p. 209, after referring to the various statutes by which the expenses attendant upon gaols are regulated, it is said, "It thus appears that the expenses connected with gaols are, in general, to be defrayed at the public charge of the county or town to which they respectively belong." And, in treating of the house of correction by way of distinction from the common gaol, it is said, at page 207, "These houses of correction (which were first established, as it would seem, in the reign of Elizabeth) were originally designed for the penal confinement (after conviction) of paupers refusing to work, and other persons falling under the legal description of vagrant. And this was, at first, their only application; for, in other cases, the common gaol of the county, city, or town, in which the offence was triable, was (generally speaking) the only legal place of commitment" (a). By the 15 Geo. 2, c. 24, the justices of a liberty were empowered to commit offenders to the house of correction for the county. But that privilege is granted on the ground that the inhabitants of the liberty contribute to the county rates: *Rex v. Amos* (b). The defendants, therefore, had no jurisdiction over this offence; and if they had, they were not empowered to commit the plaintiff to the house of correction of the liberty.

(a) 6 Geo. 1, c. 19.

(b) 2 B. & Ald. 533.

Channell, Serjt., (*Lush* with him) contrà.—The commission under which the defendants, as justices of the county, acted, gave them authority to act as well within the liberty as without; and the commission of the liberty justices does not contain any non-intromittant clause, and, consequently, does not give them exclusive jurisdiction: *Blankley v. Winstanley* (a), *Rex v. Sainsbury* (b), *Bates v. Winstanley* (c). These cases establish the proposition that, in the absence of such a clause, it must be presumed that the concurrent jurisdiction existed. Assuming, therefore, that by the charter of Edward 4 the Crown granted to the Abbot of St. Alban the power of creating justices possessing exclusive jurisdiction, the 27 Hen. 8 vested that power again in the Crown. By the 31 Hen. 8, c. 13, abbeys were abolished; and by the 32 Hen. 8, c. 20, the franchises which had been enjoyed by the late owners of such houses, were revived and were revested in the Crown. It is doubtful whether, since the 27 Hen. 8, c. 24, s. 2, the Crown can delegate to a subject the power of appointing a justice of the peace. It is laid down that "justices of the peace can only be appointed by the king's commission, and such commission must be in his name:" Bac. Abr. "Justices of Peace" (C), Com. Dig. "Justices" (A. 1). But, be this as it may, the Crown has not granted such a privilege in this case. The plaintiff's argument is chiefly founded upon the 17th section of the 27 Hen. 8, c. 24, "An Act for recontinuing Liberties in the Crown;" and it is contended that the 17th section in effect contains the non-intromittant clause, and that it gives exclusive jurisdiction to justices of the liberty. It cannot be contended that the charter of Edward 4 is still in force. Now, the 17th section has no such effect. The 16th section is restrictive. The 17th section provides, that no person residing within the liberties shall be compelled to appear out of the said liberties before any other justice. If ex-

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(a) 3 T. R. 279.

(b) 4 T. R. 451.

(c) 4 M. & Selw. 429.

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press words are required in a charter to take away the jurisdiction of the county justices, such words are equally necessary in an Act of Parliament to produce the same result. But the commission under which the defendants acted gives them authority to act as well within as without the liberty. The charter of Edward 4 is out of the question. The abbey was dissolved by the statute of Hen. 8. The right of the abbots to appoint justices of their own was not appurtenant to the abbey, and therefore the right which was vested in the Crown by the 27 Hen. 8, c. 24, was not transferred to the Whitmores and to their descendants by the grant of James I. There is nothing in that grant to sanction the inference that the Crown intended to preserve the exclusive jurisdiction of the liberty justices, and to oust the jurisdiction of the county justices. The grantees of the Crown might define the limits, provided they did so in conformity with the provisions of the 27 Hen. 8, c. 24. But the jurisdiction of the county justices could not be taken away, except by express words. There is no provision either in the statutes or in the grant which has that effect.

Secondly, assuming that the defendants, as county justices, had concurrent jurisdiction with the liberty justices, they had power to commit to the house of correction of the liberty. The offence for which they committed the plaintiff took place within the liberty. The justices of the liberty would have had the power, and as against the county justices the former have no jurisdiction. By the 9 Geo. 4, c. 31, under which the information was laid, justices are empowered to commit either to the common gaol or to the house of correction. Several statutes have been passed having reference to the place to which offenders are to be committed. See Bac. Abr "Gaol" (C). It is not necessary, however, that the defendants should rely upon any other enactment than that of the 27 Geo. 3, c. 11 (a), for

(a) 27 Geo. 3, c. 11, enacts, justice or justices of the peace, "That it shall be lawful for any within his or their respective ju-

that statute, after reciting the 6 Geo. 1, c. 19, and that doubts had arisen as to the power of justices to commit offenders to the common gaol or house of correction, expressly enacts that they may commit to either place "within their respective jurisdictions." Here the offence, though committed within the liberty, was one over which the county justices had jurisdiction; and consequently they were lawfully empowered to commit the plaintiff to the liberty house of correction: *Rex v. Amos, Jones v. Williams* (a).

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Willes, in reply, cited 4 Inst. 204, and also relied upon the 16th and 17th sections of the 27 Hen. 8, c. 24, as excluding the jurisdiction of the county justices in matters to which the jurisdiction of the liberty justices extended.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKER, B. (after stating the facts as hereinbefore set out, his Lordship proceeded)—There are two questions in this case: First, whether the defendants, as justices of the county of Herts, had jurisdiction over an offence committed in the liberty of St. Alban; secondly, whether, on a conviction for that offence, they had a power to commit to the liberty house of correction.

We are of opinion in favour of the defendants on both points.

The defendants were appointed justices for the county under a commission, which gives them authority to act as

jurisdictions, to commit, either to the common gaol or to any house of correction within his or their respective jurisdictions, as to such justice or justices shall seem most proper, such vagrants and other criminals, offenders, and persons

charged with or convicted of small offences, as by any law now in force, or hereafter to be made, he or they is or are or shall be authorised to commit to the common gaol."

(a) 3 B. & C. 762.

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such "within liberties and without;" therefore they had authority within the liberty of St. Alban, unless their authority was taken away by the express provisions of the charter constituting the liberty or some Act of Parliament: *Blankley v. Winstanley* (a), *Rex v. Sainsbury* (b), *Bates v. Winstanley* (c). The commission under which the justices of the liberty act, and which is set out in the case, does not give them *exclusive* jurisdiction within the liberty. But the charter of 2 Edw. 4 granted to the abbot and convent of St. Alban (inter alia), that they and their successors by their letters patent might constitute and assign justices of the peace within the liberty, with a non-intromittant clause prohibiting the justices of the county and all other justices in anywise to interfere. The justices of the peace appointed by the abbot and convent under the charter would undoubtedly have had exclusive jurisdiction within the liberty; but then came the stat. 27 Hen. 8, c. 24, s. 2, which put an end to the powers of all grantees of liberties to make (inter alia) justices of the peace, and enacted that all such justices should thereafter be made by letters patent under the Great Seal.

The power, therefore, of the abbot and convent ceased after this Act, and justices, constituted by the Crown by letters patent, would have no exclusive jurisdiction, unless their patents gave it them (which the patents to the justices of the liberty do not), or unless there is some legislative provision expressly or impliedly to that effect.

The 17th section of the statute 27 Hen. 8 is suggested, on the part of the plaintiff, to have this effect.

The 16th section had provided, that the justices appointed by the Crown should have power to hold their sessions and do and execute all other things within the liberty, as any other justices of the peace in any shire. This clause gives them *no exclusive jurisdiction*.

The 17th section provides, that all justices of the peace thereafter to be made by the Crown shall sit and hold

(a) 3 T. R. 279. (b) 4 T. R. 451. (c) 4 M. & Selw. 429.

their sessions in the same places as the justices of the liberty commonly used; and that no person or persons *within* the said liberties or any of them shall be thereafter in anywise compelled, by authority of this Act, to appear out of the said liberties before any other justice of assize, gaol delivery, or of the peace, than before such justices as shall be named and assigned to sit and be by the King's Highness, his heirs, and successors, within the said liberties in form above said. This clause, according to its express terms, only protects the inhabitants from being called on to appear out of the liberties, but it does not prohibit the county justices from inquiring (as the charter of Edward 4 did) of an offence committed within the liberty, either by express words or by necessary implication.

After the passing of this Act, then, the Crown might clearly appoint justices for the county, who might exercise jurisdiction over the liberty, so long as the provisions of the 27 Hen. 8 were not violated. Then followed the statute 31 Hen. 8, c. 13, which enacts that the King should enjoy all the privileges and franchises appertaining to the then dissolved monasteries, or those that should be thereafter dissolved, in as large and ample a manner as the abbots had held, or ought to have held, the same at the time *of their coming to the King's hands*; and it was enacted that they should be under the order of the Court of Augmentations. After the passing of this Act, namely, on the 5th of December, 1539, the dissolution of the Abbey of St. Alban took place; and then, by an Act passed in the 32 Hen. 8, c. 20, after reciting that the liberties, &c., of divers monasteries had been by divers statutes assigned to the King's Court of Augmentations; but that by these statutes it was not fully declared how and by what special officers the liberties, &c., which the late owners had exercised, should be ordered and exercised, it was enacted, that the same liberties, franchises, and temporal jurisdictions, which the late owners had exercised lawfully by themselves,

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or by their officers or ministers, or might have exercised, within *three months next* before the site came to the hands of the Crown, should be revived in the King's hands, and be in the rule, order, and governance of the Court of Augmentations; and that the same liberties, franchises, and temporal jurisdictions should be used and exercised, to all intents and purposes, by such stewards, bailiffs, and other officers and ministers as the King should appoint, in like manner as they were lawfully exercised by their ministers before they came to the hands of the Crown; and that the same stewards, &c. should account for the revenues in the Court of Augmentations.

No question arises in this case, whether the right of appointing justices of the peace for the liberty was revived, by the operation of the Acts 31 Hen. 8 and 32 Hen. 8, in the grantee of the Crown of the liberty, namely, the Whitmores first, and afterwards the Marquis of Salisbury. No such question, indeed, could be made, for the statute 32 Hen. 8, revived those rights only in the Crown which the abbot had lawfully exercised within three months before the site of the Abbey of St. Alban came to the Crown, and the right of the abbot to the appointment of justices was taken away by the 27 Hen. 8. Then it was said, the effect of the latter statute, the 32 Hen. 8, is to give to the justices for the liberty, when appointed by the Crown, the same exclusive jurisdiction which those appointed by the abbot had, whilst he lawfully exercised the power of appointment. But we are all of opinion that this statute does not apply to justices of the peace appointed by the Crown after the passing of that Act; for the Act applies, as before observed, only to such liberties, privileges, franchises, and temporal jurisdiction as the abbots had, used, and exercised, or might have lawfully done, within the said limit of three months; and the abbots did not and could not have lawfully exercised, *by justices* appointed by them, any jurisdiction within the liberty, inasmuch as they were prevented by the 27 Hen. 8.

The only object of the Act appears to have been the collecting of the revenue, and it applies to the officers concerned in its receipt.

The defendants having, therefore, as county magistrates, a jurisdiction over the offence though committed in the liberty, the only remaining question is, whether they could lawfully commit for that offence to the liberty house of correction.

By the 9 Geo. 4, c. 31, s. 27, under which Act this information was laid, the justices may commit, if the fine and costs are not paid as ordered, to the gaol or house of correction. No reliance, however, was placed on those precise words by my Brother *Channell*, in his able argument before us. But he contended, that the power was given by the Act 27 Geo. 3, c. 11, which provides "that it shall be lawful for any justice or justices of the peace, within his or their respective jurisdictions, to commit, either to the common gaol or to any house of correction *within his or their respective jurisdictions*, as to such justice or justices shall seem most proper, such vagrants and other criminals, offenders, and persons charged with or convicted of small offences, as by any law now in force, or hereafter to be made, he or they is or are or shall be authorised to commit to the common gaol."

We think that the defendants were justified under this enactment. The house of correction for the liberty is locally within the jurisdiction of the county magistrates, for they have concurrent jurisdiction over the liberty with the liberty magistrates, and therefore the case falls within the words of the Act; and besides, it is highly reasonable that those who have committed offences in the liberty should be punished at the expense of the liberty. We see no reason to believe that the legislature meant to confine the power of commitment to those houses of correction of which the committing magistrates have the superintendence and control.

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The magistrates had performed their duty by hearing and deciding the case, and as soon as a conviction took place they were functi officio.

For these reasons, we think that the defendants had, as county justices, jurisdiction over the offence and the offender, and were justified in committing him to the liberty house of correction. Therefore the verdict must be entered for them.

It will be observed, that we place no reliance on the several instances of the exercise of the jurisdiction of the county magistrates over matters arising within the liberty. It is therefore unnecessary to advert to them.

Verdict for the defendants.

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TANNER v. WOOLMER and Another.

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IN this case the declaration was upon an agreement under seal, made between the plaintiff and the defendants, committee of a projected Railway Company, by an agreement under seal, which recited that divers debts and liabilities had been incurred, and that it was probable that further disputes would arise respecting the liability of the members and the committee of management; and that the plaintiff, being desirous of being relieved from all such questions and disputes, had proposed to contribute and pay a certain sum to the defendants towards the payment of these claims, upon their agreeing to indemnify him in the manner therein mentioned, and to guarantee him that the sums mentioned in the first schedule to the agreement had been paid: the defendants guaranteed that the sums mentioned in the first schedule had been paid; and also, "that they would indemnify and save harmless the plaintiff from all claims expressly mentioned and referred to in the second schedule, and from all costs, damages, and expenses which he might sustain or be put to by reason thereof, and at their own costs and charges defend him against all actions and suits which should be commenced or prosecuted against him for the recovery thereof or any part or parts thereof." After the making of this agreement, an order was obtained in the Court of Chancery, under the Winding-up Act (11 & 12 Vict. c. 45), for winding up the affairs of the Company. The plaintiff was adjudged to be a contributory; and a certain sum was directed to be collected, such sum being composed of one of the sums mentioned in the second schedule to the agreement, and the rest of it consisting of costs and expenses occasioned by and incidental to the proceedings under the Winding-up Act. The plaintiff, having been ordered to pay a certain proportion of the sum directed to be collected, and having paid the same, brought an action against the defendants under the agreement:—*Held*, that the agreement merely protected the plaintiff against the claims mentioned in the schedules, and against the costs and expenses to which the plaintiff might be put by reason of the enforcement of those claims; and consequently, that the plaintiff was not entitled to recover beyond the amount of the sum mentioned in the second schedule, and which was included in the amount directed to be collected; and that the costs and expenses which he had been compelled to pay were not of the character contemplated by the agreement, and could not be recovered by him from the defendants.

dated the 30th of March, 1849, and was founded upon a covenant contained therein, whereby the defendants covenanted to indemnify the plaintiff against certain claims mentioned in a schedule, and all costs, damages, and expenses, which he might sustain or be put to by reason thereof, and at their own costs to defend him against all actions and suits which should be commenced or prosecuted against him for the recovery thereof or any part or parts thereof. The defendants paid 100*l.* into Court, and denied further liability.

It appeared at the trial, before *Martin*, B., at the Middlesex Sittings in last Michaelmas Term, from the recitals in the agreement, that the plaintiff and the defendants and some other persons had been members of a committee of management for the promotion of a railway, to be called "The Direct Exeter, Plymouth, and Devonport Railway," and had incurred divers debts; that part of those debts had been paid, which were set forth in the first schedule to the agreement; and that the debts claimed to be due, which remained unpaid, were set forth in the second schedule. The agreement then went on to recite, that disputes had arisen and were likely to arise respecting the liabilities of the members of the committee to the payment of the debts mentioned in the second schedule; and that the plaintiff, being desirous of being relieved from such disputes, had proposed to contribute the sum of 225*l.* towards the payment of such of those debts as ultimately should be found to be due, and to pay the same to the defendants, on their agreeing to indemnify him in manner therein mentioned, and to guarantee him that the sums mentioned in the first schedule had been paid. The agreement then proceeded to guarantee that the sums mentioned in the first schedule had been paid, "and also that they, the defendants, would indemnify and save harmless the plaintiff from all claims expressly mentioned and referred to in the second schedule, and from all costs, damages, and expenses which

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he might sustain or be put to by reason thereof, and at their own costs and charges defend him against all actions and suits which should be commenced or prosecuted against him for the recovery thereof or any part or parts thereof."

It further appeared, that, on the 11th June, 1849, a gentleman named Ellis, who was also a member of the committee, petitioned for and procured an order from the Court of Chancery under the Winding-up Act (11 & 12 Vict. c. 45), for the winding up of the affairs of the Company. The defendants endeavoured, but without success, to obtain the control of this petition; and ultimately an official manager was appointed, and a final order made by the Master on the 17th August, 1852. In the course of the proceedings the plaintiff was adjudged to be a contributory; and, by the final order, a sum of upwards of 3000*l.* was directed to be collected. This sum was composed of one debt only, which was mentioned in the second schedule, and all the residue consisted of the costs and expenses occasioned by and incidental to the proceedings under the Winding-up Act. The plaintiff was ordered to contribute 39*l.* towards the sum so directed to be collected; and having paid this sum, he brought the present action, insisting that he was entitled to be indemnified against the payment, by virtue of the covenant above mentioned. The defendants paid 100*l.* into Court in order to cover, and which in fact considerably more than covered, all of the debts mentioned in the final order, which the plaintiff was compelled to pay; and the question was, whether the defendants, by virtue of the covenant contained in the agreement of the 30th March, 1849, were bound to indemnify the plaintiff against the payment which he was compelled to make, by virtue of the final order, in respect of the costs and expenses occasioned by and incidental to the proceedings under the Winding-up Act. The learned Judge was of opinion that the covenant in question did not extend to indemnify the plaintiff against this payment, and the

plaintiff was nonsuited, with leave given to move to enter a verdict for him for the amount paid under the above final order less the sum of 100*l.* paid into Court.

A rule nisi was accordingly obtained by the *Attorney-General*.

In last Term (Jan. 21), *Crowder* and *Butt* shewed cause, and *Barstow* was heard in support of the rule.

Cur. adv. vult.

The judgment of the Court was now delivered by

MARTIN, B. (after stating the pleadings and facts, as before set out, his Lordship proceeded)—We are of opinion that my ruling at the trial was correct.

Upon reference to the Winding-up Act, it clearly appears that the proceedings under it are to be originated by persons called “contributories” (sect. 5). These persons are defined by the interpretation clause (sect. 3) to be “all members of the Company, and all persons liable to contribute to the debts thereof.” The very opposite class of persons are “the creditors of the Company,” who, in the same clause, are declared to include all persons having any debts or demands enforceable against the Company, and are such persons as are mentioned in the schedule to the agreement of the 30th March, 1849.

The main object of the Act was to enforce a fair and equal contribution towards the payment of the creditors of the Company or body, from all the contributories; and Mr. Ellis presented and prosecuted the petition, in the present instance, to effect this object. The payment which the plaintiff was compelled to make, and in respect of which he now claims to be indemnified, was in respect of the costs and expenses to which he was put by reason of the proceedings in Chancery of Mr. Ellis, and not in respect of any costs and expenses to which he was put by reason of the claims mentioned in the schedule to the agreement.

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He might well have been subjected to the whole of these Chancery expenses, notwithstanding that every one of the debts mentioned in the schedule had been paid; and if there be any error or mistake in this respect as regards him, it is an error not cognizable by us. It is very probable, that if the plaintiff had had his attention directed to the Winding-up Act, he would have insisted upon being indemnified against the consequences of proceedings under it, and that the defendants would in all probability have agreed to it; but it is beyond the power of the Court to remedy an omission of this kind. Their duty is merely to give the proper legal construction to the agreement actually made by the parties; and in our opinion, in the present instance, it only extends to protect the plaintiff against the claims mentioned in the schedule, and the costs and expenses to which the plaintiff might be put by reason of the direct enforcement of this claim. The costs and expenses which the plaintiff has been compelled to pay are not of this description, but of quite a different character, and in our judgment are not covered by the indemnity in question.

For these reasons, we think the rule must be discharged.

Rule discharged.

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THIS was an action upon three several policies of insurance.

The first count of the declaration stated, that the plaintiff and defendant, before and at the time when the policy of insurance hereinafter mentioned was entered into, were, with other persons, members of an association called the Newcastle General A. 1. Insurance Association; and that the plaintiff, on the 20th of February, 1851, caused to be made between the plaintiff and defendant and the other members

The plaintiff and the defendant were members of an Insurance Association, and by one of the rules of that Society it was provided (inter alia) that the sum to be paid by the Association to any suffering member for any loss or damage

should, in the first instance, be ascertained and settled by the committee; and the suffering member, if he agreed to accept such sum in full satisfaction of his claim, should be entitled to demand and sue for the same as soon as the amount to be paid has been ascertained and settled, but not before, which could only be claimed according to the customary mode of payment in use by the Society; and if a difference should arise between the committee and any suffering member relative to the settling of any loss or damage, or to a claim for average, or any other matter relating to the insurance, that arbitrators should be selected out of certain persons named in the rule, and that they should settle the claims and matters in dispute according to the rules and customs of the club. The rule also provided, that no member, who refused to accept the amount of any loss as settled by the committee in manner specified in full satisfaction of such loss, should be entitled to maintain any action at law or suit in equity on his policy, until the matters in dispute should have been referred to and decided by arbitrators appointed as therein specified, and then only for such sum as the arbitrators should award; and that the obtaining the decision of such arbitrators on the matters and claim in dispute was thereby declared to be a condition precedent to the right of any member to maintain any such action or suit. The plaintiff effected an insurance upon a ship in which he was interested with the Association, and by the policy it was expressly stated that all rules and regulations of the Association should be binding upon the assured and assurers as effectively as if such rules were inserted in the policy.

To an action by the plaintiff against the defendant, as one of the underwriters, to recover from him compensation for the loss of the vessel, which loss took place during the period covered by the policy, the defendant pleaded, setting out the above rule of the Association, and alleging that, before action brought, the committee ascertained and settled the sum to be paid to the plaintiff for the loss; that the plaintiff was dissatisfied with the settlement; and that the defendant and the committee had always been ready and willing to refer the said matters in difference relating to the said insurance to arbitration, and to have the loss ascertained and settled by arbitrators according to the intention of the said rule; but that the plaintiff was not ready and willing to do so; and that the said loss had not been so settled:—*Held*, in the Exchequer, that the rule relied upon was void, as an attempt to oust the superior Courts of their jurisdiction; and therefore that the plea was bad.

Held, also, that a similar plea, setting out the rule, and stating that the committee proceeded to ascertain the loss, but that a dispute having arisen between the plaintiff and the committee relating to the insurance, the loss had never been fixed by them, although they and the defendant had always been ready and willing to refer the matters relating to the insurance to arbitration, but that the plaintiff would not, and that the loss had never been so ascertained, was bad for the same reason.

Held, in the Exchequer Chamber, reversing the judgment of the Court of Exchequer, that although an agreement which ousts the superior Courts of their jurisdiction is illegal and void, yet the above contract was not of that description, since it did not deprive the plaintiff of his right to sue, but only rendered it a condition precedent that the amount to be recovered should be first ascertained, either by the committee or by arbitrators.

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of the association, a certain policy of insurance upon the ship Alexander, valued at 2400*l.*, at the rate of 10*l.* per cent., the adventure to commence from the date of the policy to the 20th of February, 1852. The declaration, after setting out the policy, which was in the ordinary form, proceeded to allege, that it was by the policy mutually agreed between the assured and the assurers, that all rules and regulations of the said insurance association, whether set out on the back thereof or otherwise, should be as effectually binding upon the assured and assurers, as if such rules and regulations were inserted in the policy, and formed part thereof. The declaration then proceeded to allege that the said rules and regulations, so far as they relate or are in any way material to the plaintiff's claim, are:—"That any member, who shall prove to the committee of the said association that his ship is lost, will be entitled (at the expiration of two months from the date of the first quarterly settlement) to part payment for the same, but in no case to exceed 80*l.* per cent. on the sum insured until a final account of the proceeds of the sale of the materials is furnished to the underwriters. That the sum to be paid by this association to any suffering member for any loss or damage shall, in the first instance, be ascertained and settled by the committee; and the suffering member, if he agrees to accept such sum in full satisfaction of his claim, shall be entitled to demand and sue for the same as soon as the amount to be paid has been so ascertained and settled, but not before, which can only be claimed according to the customary mode of payment in use by the society." The declaration then contained averments that the plaintiff paid the premium, that the defendant subscribed the policy for 27*l.* 11*s.*, that the plaintiff was interested in the said ship, that the same was wholly lost on a voyage during the time covered by the policy, that the plaintiff had performed all conditions and things on his part by the said contract, policy, rules, and regulations to be performed;

but that, although he had always been ready and willing that such loss should be ascertained and settled by the said committee, according to the rules of the said association, of which the defendant had notice, and although the plaintiff had requested the defendant and the said committee so to ascertain the said loss, and although a reasonable time for them so to do elapsed before the commencement of this suit, yet the said committee have refused and neglected so to do, and although two months have expired since the date of the first quarterly settlement of the said association which occurred next after the said committee had notice of the said loss, and although a final account of the proceeds of the sale of the materials of the said ship was furnished to the underwriters of the said policy, in accordance with the said rules, long before the commencement of this suit, and although a reasonable time for the defendant and the said committee to pay the said loss had elapsed before the commencement of this suit, yet neither the defendant nor the said committee have paid such loss or any part thereof; by means of which the defendant had become and is liable to pay to the plaintiff the said sum of 27*l.* 11*s.*, so insured by him as aforesaid.

The defendant pleaded, fifthly, to the first count: That one of the said rules and regulations of the said association, mentioned and referred to in and by the said policy, and which, at the time of the making of the said policy, was, and ever since has been, and still is, in full force and binding upon the plaintiff and the other members of the said association, was and is in the words and figures following; that is to say, "25—That the sum to be paid by this association to any suffering member for any loss or damage shall, in the first instance, be ascertained and settled by the committee; and the suffering member, if he agrees to accept such sum in full satisfaction of his claim, shall be entitled to demand and sue for the same as soon as the amount to be paid has been so ascertained and

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settled, but not before, which can only be claimed according to the customary mode of payment in use by the society. And if a difference shall arise between the committee and any suffering member, relative to the settling of any loss or damage, or to a claim for average, or any other matter relating to the insurance, in such case the member dissatisfied shall select one arbitrator on his or her behalf, and the committee shall select another; and if the committee refuse for fourteen days to make such selection, the suffering member shall select two, and, in either case, the two selected shall forthwith select a third; which three arbitrators, or any two of them, shall decide upon the claims and matters in dispute according to the rules and customs of the club, to be proved on oath by the secretary; and on such arbitration the party demanding it shall state the sum which he claims, and shall be allowed such proportion of the expenses occasioned by the arbitration as the sum awarded to him bears to the sum demanded, and the residue of such expenses shall be borne by him and deducted from the sum awarded to him. And in all cases where arbitration is resorted to, the settlement of the committee to be wholly rescinded, and the statement begun de novo: Provided always, and it is hereby expressly declared to be a part of the contract of insurance between the members of this association, that no member who refuses to accept the amount of any loss, as settled by the committee in manner hereinbefore specified, in full satisfaction of such loss, shall be entitled to maintain any action at law or suit in equity on his policy, until the matters in dispute shall have been referred to and decided by arbitrators appointed as hereinbefore specified, and then only for such sum as the said arbitrators shall award; and the obtaining the decision of such arbitrators on the matters and claims in dispute is hereby declared to be a condition precedent to the right of any member to maintain any such action or suit: Provided always, that, in case it

can be shewn that any person chosen as above by either party has any interest in the matter in dispute, such person shall be ineligible to be chosen as above on such matters. That the under-named persons be appointed as arbitrators when the gross sum in dispute amounts to 20*l*. or upwards, in all cases where arbitration is resorted to during the continuance of this policy." [Here follow the names of fifteen persons.] The plea then proceeded to allege, that the said committee, in pursuance of the said rule, proceeded to ascertain and settle the said loss in the said first count mentioned; but, before they had ascertained or settled it, a difference and dispute arose, which has ever since existed between the said committee and the plaintiff relating to the said insurance, to wit, as to the extent of the said loss, and as to the repairs done to the said ship, and as to the sum to be paid by the said association to the plaintiff in respect of such loss; by reason and means and in consequence of which difference and dispute, the said loss never has been ascertained or settled by the said committee; and further, that the defendant and the said committee have always, from the time when the said difference and dispute between the plaintiff and the said committee arose, been ready and willing, as the plaintiff well knew, to refer the matters of the said difference and dispute, the same being matters relating to the said insurance, and to have them referred to arbitration, and to have the same decided by arbitrators, and to have the said loss ascertained and settled by arbitrators, according to the true intent and meaning of the said rule; but the plaintiff was not ready or willing so to do, and the matters of the said difference and dispute have not, nor has any of them, been referred to arbitrators or decided; nor has the said loss been ascertained or settled by arbitrators, as by the said rule is in such case required.

The defendant pleaded, sixthly, to the first count, that the said committee did not refuse or neglect to ascertain

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the said loss as alleged; but, on the contrary, that the committee did, within a reasonable time in that behalf, and before the commencement of this suit, ascertain and settle the sum to be paid by the said association to the plaintiff for the said loss, as the plaintiff well knew; but the plaintiff was dissatisfied with the settlement so made by the said committee, and declined to accept the sum at which they so ascertained and settled the said loss; and thereupon a difference and dispute arose, which has ever since existed between the said committee and the plaintiff relating to the said insurance, to wit, as to the extent of the said loss, and as to the sum to be paid by the said association to the plaintiff in respect of such loss; and further, that the rule and regulation of the said association, mentioned and set forth in the defendant's fifth plea, was, at the time of the making of the said policy, and ever since has been and still is, in full force and binding upon the plaintiff and the other members of the said association; and such rule and regulation was and is one of the rules and regulations mentioned and referred to in the said policy; and further, that both the defendant and the said committee have always, from the time when the said difference and dispute between the said committee and the plaintiff arose, been ready and willing, as the plaintiff well knew, to refer the matters of the said difference and dispute, the same being matters relating to the said insurance, and to have them referred to arbitration, and to have the same decided by arbitration, and to have the said loss ascertained and settled by arbitrators, according to the true intent and meaning of the said rule; but the plaintiff was not ready or willing so to do, and the matters of the said difference and dispute have not nor has any of them been referred to arbitrators or decided, nor has the said loss been ascertained or settled by arbitrators, as by the said rule is in such case required.

Demurrer to each of these pleas, and joinder.

Atherton (*C. E. Pollock* with him) in support of the demurrer.—The pleas are bad. The sixth plea contains all the allegations to be found in the fifth, and the additional allegation that the committee have ascertained and settled the sum to be paid to the plaintiff. If, therefore, the sixth plea does not afford any answer to the action, the fifth plea cannot be supported.

The sixth plea is bad. It will be contended on the part of the defendant, that this rule of the association forms an essential part of the contract; and that by its terms the plaintiff has precluded himself from suing for a breach of the contract until the committee shall have first settled the sum to be paid. But that can at the most give the parties the option to refer matters in dispute that have reference to the insurance; it cannot oust the jurisdiction of the superior Courts. The plea does not rest upon the defence of an arbitration pending; and, indeed, if it did, the plea would be bad: *Harris v. Reynolds* (a). Now this rule of the association is very general in its terms. It does not even contain any provision by which the submission to arbitration can be made a rule of Court; neither does it empower the referees either to examine the witnesses on oath or to order what is to be done. The rule, therefore, does not contain powers as large as those possessed by the superior Courts, and yet, in deciding upon matters referred to them, the referees would be often under the necessity of deciding numerous complicated and difficult questions of fact and of law. This consideration affords an argument against the competency of such a tribunal. This rule is inconsistent with and opposed to the contract of insurance, and is therefore not binding upon the plaintiff; for, by the contract of insurance, the law presumes that a claim for compensation may be enforced by

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(a) 7 Q. B. 71.

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the ordinary mode of proceeding in the superior Courts. All the authorities shew that contracting parties cannot, even by the adoption of the most express language, oust the jurisdiction of the superior Courts. [*Parke*, B.—In Co. Litt. 53. b., it is said, “If a man make a lease for life, and by deed grant that if any waste or destruction be done that it shall be redressed by neighbours and not by suit or plea,—notwithstanding, an action of waste shall lie, for the place wasted cannot be recovered without a plea.”] The modern cases also uniformly support the same proposition. Upon this principle proceeded *Kill v. Hollister* (a) and *Mitchell v. Harris* (b). [*Martin*, B.—The decisions are founded upon the principle, that such a stipulation is void as repugnant to the contract. It is laid down in *Shepard’s Touchstone*, 373, that “where the condition of an obligation in the matter of it is repugnant to the matter itself, there the condition is void and the obligation good.”] The following authorities are to the same effect: *Thompson v. Charnock* (c), *Goldstone v. Osborn* (d), *Harrison v. Douglas* (e), *Street v. Rigby* (f), *Russell on Awards*, p. 64, and 2 *Arnould on Insurance*, p. 1245, *Halfhide v. Fenning* (g), and *Tattersall v. Groot* (h). Now, it is perfectly clear that the rule is repugnant to the contract, inasmuch as the committee might come to the decision that the assured is not entitled to any amount of compensation whatever.

The fifth plea is bad for the reasons already assigned. That plea does not contain the allegation to be found in the sixth plea, that the committee have ascertained and settled the sum to be paid by the association to the plaintiff for the loss; but it is founded simply upon the stipulation, that if differences shall arise, they shall be settled in the manner prescribed.

- (a) 1 Wils. 129.
 (b) 2 Ves. jun. 133.
 (c) 8 T. R. 139.
 2 C. & P. 551.

- (e) *Watson on Awards*, p. 7, n. 2.
 (f) 6 Ves. 815.
 (g) 2 Bro. C. C. 336.
 (h) 2 B. & P. 131.

Manisty contra.—The rule forms an essential part of the contract. It is valid in law, and is binding upon the plaintiff. The rule in effect provides that, in the event of a loss, the assurers shall pay to the assured such sum as the referees shall ascertain and settle as the proper amount to be paid. The sole duty of the referees is to fix the amount. This stipulation is, therefore, a condition precedent to the plaintiff's right to sue. [*Parke, B.*—The words of the agreement are that, "if a difference shall arise between the committee and any suffering member, relative to the settling of any loss or damage, or to a claim for average, or *any other matter relating to the insurance.*" that part of the rule includes all other matter relating to the insurance. It therefore embraces matters other than such as are purely matters of account. The parties to whom the differences are to be referred would therefore have to decide, whether there was or was not any loss. *Alderson, B.*—According to the defendant's argument a cause of action does exist, but the amount to which the plaintiff is entitled is not ascertained.] The right to sue is suspended until the amount of the loss shall have been ascertained. The observations that were made by *Turner, V. C.*, in *Squire v. Ford* (a), as to the mode in which Courts should construe contracts, are applicable to the present case:—"If a deed can operate two ways, one consistent with the intent, and the other repugnant to it, the Courts will be ever astute so to construe it as to give effect to the intent; and the construction, I need not add, must be made on the entire deed. The passage cited at the bar is to this effect material:—"I exceedingly commend the Judges," said Lord *Hobart* (b), 'that are curious and almost subtle to invent reasons and means to make acts according to the just intent of the parties, and to avoid wrong and injury, which, by rigid rules, might be wrought out of the act;

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(a) 9 Hare, 57.

(b) Hob. 277.

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and it has been correctly added, that, in the cases of *Crossing v. Scudamore* (a), Lord Hale cites and approves of the passage in Hobart, which is again referred to by Willes, C. J., in *Doe d. Wilkinson v. Tranmarr* (b), and is cited to be approved of, and to be governed by, in many other cases.'” [Parke, B.—It is clear that these parties intended to bind the plaintiff to refer all matters having reference to the insurance. Alderson, B.—The contract might easily have been framed in such a manner as to confine the decision of the committee solely to the amount of the loss, by stating in plain language that, “at the trial of any action, it shall not be lawful for either party to enter into the question of amount of the loss, but that it shall always be settled by the committee or by other referees, and that the only question to be tried at law shall be the right to recover.”] In *Halfhide v. Fenning* (c), Lord Kenyon said, “This is a bill against the surviving partners and the representatives of deceased partners, praying discovery and relief; to this the defendants have pleaded, that, by the articles, if any controversy should arise between the partners they should be referred to arbitration, and that there should not be any suit at law or in equity. There can be no doubt that parties entering into an agreement that disputes shall be referred to arbitration are bound by such agreement.” [Parke, B.—That is contrary to a host of other authorities.] The right to sue was suspended here: *Gibbons v. Vouillon* (d) and *Stacey v. Bank of England* (e).

Atherton was not called upon to reply.

PER CURIAM (f).—We are clearly of opinion that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

- (a) 1 Vent. 141.
- (b) 2 Wils. 75.
- (c) 2 Bro. C. C. 336.
- (d) 8 C. B. 483.

- (e) 6 Bing. 754.
- (f) Parke, B., Alderson, B.,
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A WRIT of error having been brought in the Exchequer Chamber upon the above judgment, the case was argued (a) (June 17) by

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Bramwell for the plaintiff in error.—It was conceded in the Court below, that if it could be made a condition precedent to the right to bring an action, that the amount to be recovered should first be ascertained by the committee or arbitrators, the parties had shewn their intention to do so. But the Court considered that such a bargain was invalid in point of law on two grounds: first, because it ousted the Courts of law of their jurisdiction,—whereas, by the terms of the contract, the Courts have no jurisdiction until the amount of loss is ascertained; and secondly, it was said that the agreement not to sue, except conditionally, was repugnant to the contract,—whereas it is of the substance of the contract itself. [*Maule, J.*—If the parties to a policy agree that no action whatever shall be maintained, but that some merchant shall decide as to the claim, that would not be binding; but if the agreement is, that the one party shall pay the amount which a third party shall ascertain to be the loss, that would be good.] An undertaking to pay what an arbitrator shall determine is like the ordinary case of an agreement to pay the amount which a surveyor or engineer shall certify to be due. It is conceded, that if there is an absolute and unqualified covenant or agreement to do certain things, and then follows a substantive and independent covenant or agreement, that, if any dispute shall arise as to those matters, it shall be referred to arbitration, that would be no bar to an action. This, however, is not the case of an agreement to pay the actual loss, followed by an agreement to refer to arbitration any dispute respecting it, but

(a) Before *Coleridge, J., Maule, Erle, J., Williams, J., Talfourd, J., J., Wightman, J., Cresswell, J., and Crompton, J.*

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an agreement to pay a sum to be ascertained by the committee, or, if there is any difference, by arbitrators. [*Maule*, J.—The agreement assumes that the suffering member will be in a situation to maintain an action; and then it says, that, if he has a cause of action, he shall not enforce it until there has been a proceeding under that rule. It is not that such proceeding shall give him a cause of action, but that he shall have no right to be paid until that has been done.] There is no absolute agreement to pay the actual loss, but only an amount to be ascertained by the committee or arbitrators; so that, even if the contract be unlawful, the plaintiff, who is suing for the actual loss, cannot recover. It is submitted, however, that the agreement is not unlawful, and that the authorities relied on do not support that construction of it. In *Kill v. Hollister*(a) there was a cause of action which gave the Court jurisdiction. Again, in *Thompson v. Charnock*(b), there was an admitted breach of covenant, and an attempt to oust the Court of their jurisdiction. [*Maule*, J.—The rule says, that the decision of the arbitrators shall be a condition precedent to the right of any member to maintain any action; but it cannot be made a condition precedent, assuming that the member has a right to sue. In order to make it a condition precedent, the instrument must be construed in this way: that no right to payment shall accrue until the decision of the committee or arbitrators.] There is no repugnancy in such an agreement. It is not like the case of *Furnival v. Coombes*(c), where the churchwardens and overseers of a parish entered into a covenant for the payment of money, with a proviso that they should not be personally liable. [*Wightman*, J.—The committee or arbitrators are to determine whether the member has any right of action; and if he has, he may bring his action.] The passage cited from Co. Litt. 53. b. has relation to a tort; and there is no doubt that an agreement

(a) 1 Wils. 129.

(b) 8 T. R. 139.

(c) 5 M. & G. 736.

not to sue in respect of a tort or trespass would be void. [*Mauls*, J.—There is no decision which prevents two persons from agreeing that a sum of money shall be paid upon a contingency; but they cannot legally agree, that, when it is payable, no action shall be maintained for it.] *Goldstone v. Osborn* (a) is an authority in support of the defendant's view, for that was an agreement that the cause of action, not the amount of damage, should be determined by arbitration. This case resembles *Worsley v. Wood* (b), where, by the terms of the policy, the procuring a certificate was a condition precedent to the right of the assured to recover.

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Atherton for the defendant in error.—This is a contract of indemnity, with a collateral and superadded machinery for settling disputes in lieu of the ordinary legal tribunals. The declaration, in the first instance, discloses an absolute undertaking by the defendant to make good the plaintiff's loss to the extent of the sum subscribed, and it afterwards states that the contract was subject to the rules of the association. If it were intended that no right of action should exist until the amount to be recovered was ascertained, the defendant, instead of using the ordinary language of an assurer, would have undertaken, in the event of loss, not to indemnify but to pay such sum as the committee or arbitrators might determine. The rules only introduce directions for adjudication, and do not qualify the contract. The words "sum to be paid" must be read with reference to the preceding contract. If a difference, however simple, should arise between the committee and the suffering member, the whole matter would be opened, and it would be competent for the arbitrators to entertain any question of law or fact, and also to decide whether or not anything was due. But there is no power to take the

(a) 2 C. & P. 550.

(b) 6 T. R. 710.

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evidence on oath, nor any provision for making the submission a rule of Court, or for enforcing the award by attachment. No doubt the parties intended that the arbitration clause should be compulsory, and the authorities cited in the Court below shew that an agreement which prevents the parties from resorting to the ordinary tribunals is illegal and void. The same doctrine has been laid down in Courts of equity: *Street v. Rigby* (a), *Mitford's Equity Pleading*, p. 264.

Bramwell replied.

COLERIDGE, J.—We are all of opinion that the judgment of the Court below cannot be sustained. There is no dispute as to the principle. Both sides admit that it is not unlawful for parties to agree to impose a condition precedent with respect to the mode of settling the amount of damage, or the time for paying it, or any matters of that kind, which do not go to the root of the action. On the other hand, it is conceded that any agreement which is to prevent the suffering party from coming into a Court of law, or, in other words, which ousts the Courts of their jurisdiction, cannot be supported. The only question is, whether this case falls within the one or the other description. Now, this is an action on a policy of insurance, and the plaintiff, in his declaration, states that the rules of the association are to be taken as part of the contract; indeed, he himself relies upon some of them, since he avers a performance on his part. The question arises on the 25th rule, which commences by stating, “that the sum to be paid by the association to any suffering member for any loss or damage shall, in the first instance, be ascertained and settled by the committee; and the suffering member, if he agrees to accept such sum in full satisfaction of his claim,

(a) 6 Vcs. 815.

shall be entitled to demand and sue for the same as soon as the amount to be paid has been ascertained and settled, but not before." Mr. *Atherton*, in order to make his argument good, would alter the language of the rule, and read it as if the suffering party had a right to bring an action in respect of something which was to be paid. But that is not so. The rule, indeed, assumes that there is a loss or damage; but the amount is, in the first instance, to be ascertained by the committee, and when that is done, and not before, the suffering party is entitled to demand and sue for it. The rule goes on to say, "And if any difference shall arise between the committee or any suffering member, relative to the settling of any loss or damage, or to a claim for average, or any other matter relating to the insurance, in such case the member dissatisfied shall select one arbitrator on his or her behalf, and the committee shall select another." That must be governed by what precedes it, and the differences must be of something which was before under discussion between the committee and the suffering member. It is like an adjustment of damage, where some damage is admitted, and the only question is as to the amount. Then the rule proceeds to say, that "the two selected shall forthwith select a third, which three arbitrators or any two of them shall decide upon the claims and matters in dispute." There again, the claims and matters in dispute must be in respect of the same things which were before brought under discussion. Then comes a proviso "that no member who refuses to accept the amount of any loss as settled by the committee in manner hereinbefore specified, in full satisfaction of such loss, shall be entitled to maintain any action at law or suit in equity on his policy, until the matters in dispute shall have been referred to and decided by arbitrators appointed as hereinbefore specified, and then only for such sum as the said arbitrators shall award; and the obtaining the decision of such arbitrators *on the matters and claims in dis-*

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pute, is hereby declared to be a condition precedent to the right of any member to maintain any such action or suit." That is to say, the suffering party shall go before the committee for the purpose of settling the amount of the loss or damage, and when he has not acquiesced in the arrangement of the committee, he shall go before the second tribunal; and that is declared to be a condition precedent to his right to bring an action. That does not oust the Courts of law of their jurisdiction, but only imposes as a condition that the amount shall be ascertained before he is entitled to sue for it. But, supposing any observation might be made upon the generality of one or two of the expressions in the rule, it is important to observe, that, in this particular case, the only matter in dispute is as to the extent of the loss or repairs, so that it is brought within the terms of the first clause of the rule, which gives the key to the whole. It is the same in principle as the ordinary case of a person who brings an action for a sum of money, a condition having been imposed that some person shall ascertain the amount before he is at liberty to sue.

Judgment reversed.

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DE ROTHSCHILD *v.* SHILSTON (a).

THIS was an action for demurrage. Before issue joined, the defendant took out a summons to change the venue from London to Devonshire, on the usual affidavit, that "the plaintiff's cause of action arose in the county of Devon and not in London, nor elsewhere out of the county of Devon." The summons was heard before *Platt*, B.; and there being no affidavit in answer, his Lordship made the order.

Willes obtained a rule nisi to rescind the order, on the ground that, since the Reg. Gen., H. T., 1853, r. 18, the venue could not be changed on the common affidavit.

Collier shewed cause (May 7).—The question turns on the meaning of the Reg. Gen., H. T., 1853, r. 18, which directs, that "no venue shall be changed without a special order of the Court or a Judge, unless by consent of the parties." It is submitted that, under that rule, it is not necessary to state any special grounds, and that its only effect is to abolish the practice of changing the venue by a side-bar rule. [*Parke*, B.—Formerly the venue could in certain cases be changed as a matter of course, on the common affidavit that the cause of action arose elsewhere. The Reg. Gen., H. T., 2 Will. 4, r. 103, provided, that the venue should not be brought back, except upon an undertaking of the plaintiff to give material evidence in the county in which the venue was originally laid. The object of the recent rule was to put a stop to that practice,

Under the Reg. Gen. H. T., 1853, r. 18, in cases in which the venue might, under the previous practice, be changed on the common affidavit, the application may now be made either before or after issue joined. If made before, the party applying should state all the circumstances on which he relies, as he will not be allowed to add to or amend his case. It will be sufficient, however, for him to rely on the common affidavit; but, in that case, he may be answered by affidavits on the other side. If the application be made after issue joined, the affidavits in support of it must shew that the issues joined may be more conveniently tried in the county to which it is proposed to change the venue.

(a) This case was decided in Trinity Term (June 10), but is published earlier on account of its practical importance.

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and not to allow the venue to be changed without a special order of the Court or a Judge. In the case of *Ramsden v. Skipp* (a), the Court of Common Pleas considered that the rule required a special affidavit, and they imposed this further limitation, that the order could not be made until after issue joined. No doubt, it is more convenient that the application should be made after issue joined, where it is practicable; but in country causes it frequently happens, that issue is not joined until a day or two before the commission day. The Court of Common Pleas do not appear to have contemplated that difficulty. On the other hand, although the precise issue may not be known, the parties are generally aware of the real question to be tried.] There is no reason for requiring a special affidavit in support of the application, for, if there are any grounds for opposing it, the other party may bring them before the Judge, who will decide on their sufficiency.

Willes in support of the rule.—The plaintiff is the dominus litis, and entitled to lay the venue where he pleases, subject to the rules of Court. Before the recent rule, it was only in a certain class of transitory actions that the venue could be changed on the common affidavit; in others, such as actions on specialties, bills of exchange, &c., it was necessary to shew some special grounds: 2 Chit. Arch. Prac. pp. 1165, 1170, *Mondel v. Steele* (b). Unless the recent rule be construed as applying to both classes of actions, it will still be necessary to refer to the old practice, and see whether the particular case is one in which the venue could formerly have been changed on the common affidavit; moreover, this consequence would follow, that in many cases a defendant would have it in his power, by making the common affidavit, to put the plaintiff to needless ex-

(a) Easter Term, May 6.

(b) 8 M. & W. 640.

pense. [*Parke, B.*—The common affidavit is sufficient, if no answer is given to it. It can scarcely be contended that the recent rule meant to abolish the practice founded on the statutes 6 Rich. 2, c. 2, and 4 Hen. 4, c. 18, as explained in *Mondel v. Steele (a)*.] The case of *Martin v. Daws (b)* is at variance with the principles there laid down. [*Parke, B.*—I do not hold myself responsible for that decision.]

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The Court said, that before they gave judgment they would confer with the other Judges.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—We think, in this case, that the rule should be discharged. This was an application to set aside an order of my Brother *Platt*, for changing the venue on what is called the usual affidavit, “that the cause of action arose in the county of Devon, and not elsewhere.” There was no answer to this affidavit, and the order was thereupon made. We think the order was right, and the affidavit being unanswered was sufficient.

The general rule on this subject may be thus stated, and we may say that we believe it may be taken as the general opinion of all the Judges.—The application for this purpose may be made either before or after issue joined, as may be most convenient to the parties in the proper conduct of the cause. If the application be made before issue joined, it is requisite that the party applying should state in his affidavit all the circumstances on which he means to rely. He will not be allowed to add to or amend his case when cause is shewn. It will be sufficient, however,

(a) 8 M. & W. 640.

(b) 11 M. & W. 734.

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for him to rely only on the fact, that the whole cause of action arose in the county to which he desires to change the venue; but if he does so, he may be answered by any affidavits negating this fact, or shewing that the cause may be more conveniently tried in the county where the venue is laid. If made after issue joined, the affidavits, in support of the application, must shew that the issues joined may be more conveniently tried in the county to which the party applying proposes to change the venue. Of course these affidavits are open to an answer by the other party. In all these cases the Court or Judge will decide, after hearing both sides, whether the venue is to remain or be changed as prayed, or be laid in some third county, according to its discretion.

In this case the application is made before issue joined, and the ordinary affidavit is left unanswered. The rule will, therefore, be discharged; but without costs, it being a new case (a).

Rule discharged.

(a) His Lordship also stated, that a committee of Judges, to whom the subject had been referred, had drawn up the following report:—

“First, that in their opinion it is more convenient, as a general rule, that the application to change the venue by rule or summons may be made before issue joined: provided that this shall not prejudice either party from applying after issue is joined to lay the venue in another county, if it shall appear that it may be more conveniently tried in such county.

“Secondly, that a defendant, in his affidavit to obtain the rule nisi

to change the venue, or in support of a summons for that purpose before issue joined, should state all the circumstances on which he means to rely as the ground for the change of venue; but that he may if he pleases rely only on the fact that the cause of action arose in the county to which he seeks to have the venue changed, which ground shall be deemed sufficient, unless the plaintiff shews that the cause may be more conveniently tried in the county in which it was originally laid, or other good reason why the venue should not be changed.

“J. PARKE,
 “WM. WIGHTMAN.”

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MONTAGU and Others, Executors, v. KATER.

Feb. 12.

THIS was an action of assumpsit by the plaintiffs, executors of one R. Fountayne Wilson, deceased. The declaration stated that, by a certain agreement made on the 20th of September, 1843, between Mr. Wilson and the defendant, the latter agreed to sell to Mr. Wilson for the sum of 25,000*l.* the manor and lordship of Mexbrough, in the county of York; and that the defendant further agreed that he would, within a calendar month from the date of the agreement, make and deliver to Mr. Wilson or his solicitor an abstract of his title to the said manor and lordship; and also that the defendant would, on the 2nd of January, 1844, on receiving the purchase-money, execute a proper conveyance of the property, &c. The declaration laid as breaches, first, that the defendant did not, within one calendar month, or at any time, deliver to Mr. Wilson or his solicitor a proper and sufficient abstract of the defendant's title to the said manor, lordship, lands, and premises, but that the abstract, which was delivered

By a settlement, made in 1810 by lease and release on the marriage of Henry K. and Mary R., certain landed estates, then limited to one F. R. for life, with remainder in fee to the said Mary R., were settled to the use of Henry K. for life, remainder to the use of Mary R. his intended wife in like manner, with remainder to the use of all or any of the children of the marriage, with such limitations or remainders over as Henry K. and Mary K. his wife should from

time to time, by any deed or deeds, writing or writings, with or without power of revocation and new appointment, direct, limit, or appoint; and in default of such joint direction, limitation, or appointment, or in case any such should be made which should not be a complete disposition of the said hereditaments thereby settled, then, as the survivor of them, the said Henry K. and Mary K. his wife, by deed or by will should direct, limit, and appoint; and in default of such appointment, joint or several, to certain uses which would give a title to the eldest son. There were two sons of this marriage; and by a deed, dated 1832, Henry K. and Mary K., in exercise of the joint power, appointed the hereditaments, subject to their own life estates, to their youngest son (the defendant) in fee, subject to a power for them jointly by deed to revoke such appointment, and by the same or any other deed to be by them jointly executed to limit or appoint any other uses in favour of their children which might be warranted by the several powers contained in the settlement of 1810. By a deed of the 4th of February, 1833, Henry K. and Mary K. jointly revoked the uses contained in the deed of 1832, but made no new appointment. On the 19th of February, 1833, Mary K. died; and in the following month of May, Henry K., by will, did, in execution of the powers vested in him, direct, limit, and appoint the hereditaments to the defendant in fee.

Held, that the effect of the revocation of the joint appointment was to restore the uses of the original settlement, including the joint and several powers of appointment, and consequently that the appointment by the will of Henry K. was a valid exercise of the power by the survivor, and that the defendant was entitled to the property.

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by him, was imperfect and insufficient; and, secondly, that the defendant did not make a good and valid title to the said premises.

The defendant, by his second and third pleas, traversed these breaches respectively.

A special verdict was found, which embodied the following facts:—The defendant delivered, within the time agreed upon, to Mr. Wilson's solicitor an abstract of his alleged title, as seised in fee in the premises in question.

By this abstract it appeared, that, at the time of the making of the indentures of lease and release next mentioned, the premises stood limited to the use of and vested in Frances Elizabeth Reeve, widow, for her life, with remainder to the use of Mary Frances Reeve, spinster, and her heirs: And that, by virtue of indentures of lease and release, bearing date respectively the 28th and 29th days of May, A. D. 1810, the release being made between one Henry Kater of the first part, the said Frances Elizabeth Reeve of the second part, the said Mary Frances Reeve, spinster, of the third part, J. W. Birch, E. Rudge, H. W. Brown, and W. Rogers, Esquires, of the fourth part, and George Frere, Esquire, of the fifth part, being the settlement executed previously to the marriage then in contemplation, and which was afterwards solemnised between the said Henry Kater and Mary Frances Reeve, the said premises were conveyed and assured by the said Frances Elizabeth Reeve and Mary Frances Reeve, with the privity of the said Henry Kater, unto the said George Frere, his heirs and assigns, that is to say, by a lease of the said premises, To hold for one year from the 28th day of May aforesaid, made on that day by the said Frances Elizabeth Reeve and Mary Frances Reeve to the said George Frere by one of the said indentures; and by a release of the said premises in fee, made on the 29th day of May, during the said term of one year, by the said Frances Elizabeth Reeve and Mary Frances

Reeve to the said George Frere and his heirs, by the other of the said indentures, to the uses following, that is to say: To the use of the said Henry Kater and his assigns, for the life of him the said Henry Kater, without impeachment of waste, with remainder to the use of the said Mary Frances Reeve, afterwards Mary Frances Kater, the wife of the said Henry Kater, for her life, without impeachment of waste, with remainder to the use of all and every or such one or more of the children of the said Henry Kater by the said Mary Frances Kater, either exclusively, or in such parts, shares, or proportions, and for such estate or estates, interest or interests, and with such limitations and remainders over, and charged or chargeable with the payment of such yearly or other sum or sums of money, such limitations or remainders over and charges nevertheless to be for the benefit of some or one of the same children, and at such age or ages, time or times, and in such manner and form as they the said Henry Kater and Mary Frances Kater should from time to time, by any deed or deeds, writing or writings, with or without power of revocation and new appointment, to be by them respectively sealed and delivered in the presence of and to be attested by two or more credible witnesses, direct, limit, or appoint; and in default of such joint direction, limitation, or appointment, or in case any such should be made which should not be a complete disposition of the said hereditaments thereby granted and released, or intended so to be, then as the survivor of them the said Henry Kater and Mary Frances Kater should, by any such deed or deeds, writing or writings, to be executed as aforesaid, or by his or her last will and testament in writing, or by any codicil thereto, to be by him or her signed and published in the presence of and attested by three or more credible witnesses, direct, limit, or appoint; and in default of such direction, limitation, or appointment, and in case any such direction, limitation, or appointment should be made,

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then, when and as the estates and interests thereby created, raised, or limited, should respectively end and determine, and as to such part or parts of the said hereditaments whereof no such direction, limitation, or appointment should be made, to the use of the said J. W. Birch, E. Rudge, H. W. Brown, and H. Rogers, and their heirs, upon trust, in case there should be issue of the said marriage between the said Henry Kater and Mary F. Kater one son, and not more than three other children, who should be living at the time of the decease of the survivor of them the said Henry Kater and Mary F. Kater, or who, being sons, should have attained the age of twenty-one years, or who, being daughters, should have attained that age or been married, and afterwards departed this life in the lifetime of the said Henry Kater and Mary F. Kater, or the survivor of them, then that the said W. Birch, E. Rudge, H. W. Brown, and W. Rogers, or the survivors of them, or survivor of them, or the heirs or assigns of such survivor, should pay and apply the rents, issues, and profits of the hereditaments, or a competent part thereof, in or towards the maintenance and education, or otherwise for the benefit of the eldest son for the time being of the said Henry Kater by the said Mary Frances, until such son should attain the age of twenty-one years; and when and as soon as such son should have attained that age, then should grant, convey, and assure all and singular the said hereditaments to the use of such son, his heirs and assigns, for ever.

It further appeared by the said abstract that the said Henry Kater had two children by the said Mary Frances his wife, both of whom were sons, and born before the making of the deed-poll hereinafter next mentioned, viz. one Henry Herman Kater, the eldest son, and one Edward Kater, the defendant in this action; and that, by a certain deed-poll, bearing date the 15th of October, 1832, and sealed and delivered by the said Henry Kater and

Mary F. Kater in the presence of and attested by two credible witnesses, the said Henry Kater and Mary Frances Kater, after stating that they had for some years past, with great and affectionate anxiety, reflected upon that disposition of their property which might best conduce to the welfare and happiness of their children, and had, after much and careful consideration, resolved to exercise the several powers given to or vested in them by virtue of the said therein and hereinbefore mentioned indenture of release in manner thereafter mentioned, did, in exercise and execution of the power or authority reserved to them by the said indenture of release of the 29th of May, 1810, and of every other power and authority them in that behalf enabling, direct, limit, and appoint—That the said premises should thenceforth remain, continue, and be subject to the said life estates of the said Henry Kater and Mary Frances his wife, to the use of the said Edward Kater, his heirs and assigns, for his and their absolute benefit, subject to the power of revocation thereafter contained and next hereinafter mentioned; and that, in and by the said deed-poll, it was provided and declared to be the true intent and meaning of the said Henry Kater and Mary Frances his wife, that it should and might be lawful to and for the said Henry Kater and Mary Frances his wife, at any time or times thereafter, and from time to time during their joint natural lives, by any deed or deeds, instrument or instruments in writing, with or without power of revocation, to be by them respectively sealed and delivered in the presence of and attested by two credible witnesses, to alter or vary, or absolutely to revoke, determine, and make void all or any of the directions, limitations, or appointments, uses, trusts, ends, intents, and purposes thereinbefore expressed or contained of or concerning the said manors, messuages, advowsons, tithes, lands, and hereditaments and premises by those presents limited and appointed or declared, or intended so to be, or any part or parts of the same; and by the same or any other

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deed or deeds, instrument or instruments in writing, with or without power of revocation, to be by both of them the said Henry Kater and Mary Frances his wife sealed and delivered as aforesaid, to direct, limit, appoint, or declare any new or other use or uses, trust or trusts, estate or estates, interest or interests, of or concerning the said premises, or any part or parts of the same, in such manner as they should think proper, and which should be warranted by the terms of the said several powers contained in the said indenture of the 29th of May, 1810, anything therein contained to the contrary notwithstanding; and that, by a certain other deed-poll, bearing date the 4th of February, 1833, and signed, sealed, and delivered by the said Henry Kater and Mary Frances Kater in the presence of and attested by two credible witnesses, they the said Henry Kater and Mary Frances his wife, in exercise and execution of the power or proviso to them for that purpose limited or reserved in and by the said above-mentioned deed-poll of the 15th of October, 1832, and of every other power, proviso, or authority enabling them in that behalf, did absolutely revoke, determine, and make void all and every the directions, limitations, or appointments, uses, trusts, ends, intents, and purposes, in and by the said deed-poll of the 15th of October, 1832, expressed, declared, or contained of and concerning the said premises.

Within a few days after the making of the said deed-poll, bearing date 4th of February, 1833, viz. on the 19th of February, the said Mary Frances Kater died, leaving the said Henry Kater her surviving. After the death of his wife on the 24th of May, 1833, Henry Kater made, signed, and duly published his last will in writing, executed by him the said Henry Kater in the presence of and attested by three credible witnesses, and thereby, after reciting that certain powers were given or reserved to him by the said indenture of lease and release of the 28th and 29th of May, 1810; and that, having with great and affectionate anxiety reflected upon that disposition of the pro-

perty therein referred to which might best conduce to the welfare and happiness of his children, he had, after much and careful consideration, resolved to exercise the several powers vested in him in the manner thereafter and hereinafter mentioned, and that his son, Henry Herman Kater, was absolutely entitled, under the will of his grandmother, to a certain sum of money in the funds, producing 140*l*. per annum, he did, by virtue and in exercise of the power given him by the said indentures of lease and release, and of all and every power him thereto enabling, direct, limit, and appoint that all and singular the premises comprised in and settled by the said indentures, with their and every of their rights, &c., should remain, continue, and be; and that the said indentures should operate and enure to the use of his son Edward Kater (the defendant), his heirs and assigns, for ever.

The said Henry Kater died after making his said will, which was duly proved on the 12th of May, 1835.

Henry Herman Kater and Edward Kater were the only children of the said Mr. and Mrs. Kater, who were living at the time of the death of Mr. Kater.

The special verdict then proceeded to find that, if the said appointment made by the will of Henry Kater was a valid and effectual appointment of the premises, then the defendant did, within the specified time, deliver to Mr. Wilson's solicitor a proper and sufficient abstract of the defendant's title to the said premises, and that he did also make to Mr. Wilson a good and valid title as required by the said agreement.

The case was argued last Term (Jan. 24th) by

Watters for the plaintiff.—The substantial question is, whether, at the time of the execution of the will of Henry Kater, the power of appointment limited to the survivor of Mr. and Mrs. Kater by their marriage settlement was a valid and subsisting power. If it was, the will in question

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operated as a good exercise of the power. The plaintiff, however, contends that the power had been satisfied before the making of the will, and consequently that, at that time, the power was extinguished. The question depends upon the doctrine of resulting uses. Now, if, upon the revocation of the appointment of 1832, the power of appointment to the survivor of the donees contained in the settlement of 1810 did result, it must have done so, either in consequence of some express intention to that effect on the part of the settlors or of the donees of the power, or by reason of some rule of law, founded upon an implied intention on the part of the settlors, that, in the event in question, the powers in the original settlement should result. The plaintiff, therefore, submits—First, that in the absence of express evidence of intention on the part of the original settlors, that, in the event above mentioned, the power in question should result, such power, from want of capacity to do so, could not have resulted. Secondly, that if it had such capacity, the existence of intention on the part of the donees of the joint power, clearly manifested at the time of the execution of the joint appointment, that the power should not result, prevented it from so doing. And thirdly, that if the intention of such donees, to be gathered from the deed-poll of 1832, would in itself be inoperative to rebut the resulting of the separate power, such intention would be sufficient to raise by implication, in default of an exercise of the joint power of appointment reserved by the deed of appointment, a limitation to the uses of the settlement of 1810, ulterior to the joint and several powers of appointment thereby limited to the donees.

First, an exercise of the joint power of appointment by the deed-poll of 1832, exhausted the joint and several powers of appointment, by creating the full measure of estate authorised to be created by those powers, and substituted in their place a limitation to the second son in fee. The appointment to him divested the limitation in default of appointment contained in the settlement of 1810; but

the joint and several powers therein contained were not divested or displaced, but were *exercised*. The full measure of ownership, which had before resided in those powers, was transferred to and formed a component part of his estate. On the execution of the power of revocation by the deed-poll of the 4th of February, 1833, such revocation merely restored the estates which were divested or displaced by the execution of the power, namely, the limitations on default of the joint and several powers of appointment contained in the settlement of 1810; but it did not restore or revive the powers, or either of them, which had been already exhausted and satisfied. The defendant must contend that the powers limited by the settlement of 1810 resulted on the revocation of the appointment of 1832; and he must consequently contend that the effect of such revocation was to restore the powers as if no appointment had ever been made. But the limitation to the son was an actual subsisting limitation from the time of the execution of the appointment of 1832 until its revocation, and constituted a link in the ownership. The revocation did not defeat this estate *ab initio*, but determined it from the time of the revocation only. If this had been a limitation to such uses as the donees of the power should appoint, with an immediate limitation in default of appointment to their eldest son in fee, and they had appointed in favour of their younger son with power of revocation, and they had subsequently revoked the appointment, such revocation clearly would not in any way interfere with the title of the younger son to possession during the period between the appointment and the revocation. The determination of his estate would date from the time of the revocation; and the effect of the revocation is precisely the same, although the estate of the younger son is not an estate in possession, but reversionary, expectant on the death of his parents. Now, on the supposition that his estate is reversionary, and that the parents have estates for years

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instead of life estates, an appointment in favour of the younger son would entitle his wife to dower, subject to the interests of the parents. It may be contended that the wife's title to dower would not be defeated by a subsequent revocation of the estate of the younger son, inasmuch as the revocation could not have a greater effect than a conditional limitation to determine the estate on a specific event would have had if inserted in the appointment; which clearly would not have defeated the wife's title to dower: *Moody v. King* (a). If, then, not only would the estate created by an exercise of the power of appointment govern the ownership during the period between the time of the appointment and of its revocation, but would also create legal burthens, such as dower, which might affect the estate as against ulterior claimants, it is manifest that a revocation could not restore the limitations of the original settlement in such manner as if the powers had never been exercised. The only question would be, whether, admitting the revocation to determine the limitation derived under the appointment from the time of the revocation only, and not ab initio, the powers could possibly result so as to be successively exercised. Neither principle nor authority supports such a position. *Ward v. Lenthall* (b) is an authority that the power in the present case would not result. There a man levied a fine to uses, with a power of revocation and limitation of new uses; and, by a second deed, he revoked the uses, and made a new appointment of uses, with a power only to revoke; and, by a third indenture, he revoked the uses of the second indenture, and

- limited new ones; and it was held that, as the appointor had reserved only in the deed of appointment a power of revocation without a power of limiting new uses, he could only revoke, and could not limit new uses by virtue of the estate first raised, that is to say, under an exercise of the

(a) 2 Bing. 447.

(b) 1 Sid. 343; 2 Keb. 269, *S.C.*

power of appointing new uses contained in the original settlement. Lord *St. Leonard's*, in 1 Sugden on Powers, 481, 6th edit. (a), whilst he admits the authority of *Ward v. Lenthall*, attempts to distinguish it from a case like the present, where the original power of appointment is precedent to the uses of the settlement, instead of being limited by way of power of revocation and new appointment. He says:—"If the original power be a general primary one, and the estate be settled only in default of and until its execution, a new appointment, with a power of revocation only, and a subsequent exercise of that power, would, it is apprehended, restore the original settlement, and with it the general powers of appointment which would effect the intention. For in such case the original power of appointment in its creation overrides all the other uses, and comes in lieu of the fee. . . . But where, on the contrary, the estate is at once settled to uses in strict settlement with a power of revocation, and that power is afterwards executed by a new limitation, and a power of revocation only reserved, and the latter power is then exercised—in that case the last revocation would restore the original settlement, but not, it should seem, the original power of revocation. For if the new power of revocation was not tantamount to a power to revoke and limit new uses, of course a revocation can only operate as such, that is, to revoke the appointment, and then the original power is at an end; for the first appointment was a full exercise of the power, but with the benefit of the power to revoke, and when *that* power is exercised, the original power is wholly exhausted, and consequently the original settlement remains incapable of being revoked." But the question is, why might not the power of new appointment in the original settlement have been exercised? If the distinction attempted to be taken by Lord *St. Leonard's* is well founded, it must

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(a) 7th Edit. Vol. 1, p. 459.

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be so by reason of there being a difference between a power of appointment at the beginning of a settlement and a power of revocation and new appointment at the end of it; but there is no such difference. In the case of a limitation to uses in strict settlement, with a power of revocation and new appointment superadded, and the uses are revoked, the subsisting uses of the property immediately after the revocation would be as follows:—the limitations would stand to such uses as the settlor in exercise of the power of new appointment should appoint, and in default of appointment to the settlor in fee. If, then, the settlor were to exercise the power of new appointment with a power of revocation, and were afterwards to revoke, there is no reason why, consistently with the principle adopted by Lord *St. Leonard's*, the power should not result; for, by the exercise of the power of revocation in the first settlement the power of new appointment became a primary power, as much so as if it had originally been limited as the primary use of the settlement. *Ward v. Lenthal* must therefore be considered an authority that, in a case like the present, the original power would be extinguished.

Secondly, assuming that the power to the survivor would otherwise result, it could not do so in opposition to a clear intention to the contrary on the part of the donees of the joint power, on the exercise of the appointment of 1832. As resulting uses wholly depend upon intention, the question would be, whose intention is to govern the resulting use in the present instance. In ordinary cases, the intention of the settlors would govern the resulting use where the uses result contemporaneously with the execution of the settlement; but where, as in the present case, the whole dominion over the use is vested in the donees of the power, and the use results in consequence of a dealing with the property by them, the use would result subserviently to the intention of such donees, who for this purpose represent the settlors. Under an exercise of the power, the

donees might limit what estates they pleased in favour of their children. They might specifically appoint estates to the children in part, and leave them to take other parts under the limitations in default of appointment; and they might modify their powers of appointment in such manner as they should think fit, provided only that they were clearly to denote what should be the subsisting uses of the property. *Hele v. Bond (a)* is an authority that the intention of the original settlors, even if expressed, could not govern the resulting of the power. There the original settlement contained a power for Sampson Hele to revoke the uses of the settlement; "and any such new limitation or appointment by any other writing sealed, he shall and may, *from time to time*, revoke or alter, and make any other limitation of the premises, as often as he shall think fit." Sampson Hele revoked and appointed new uses, but the deed of revocation and new appointment did not contain any power of revocation and new appointment: and it was held, that he could not revoke the appointment and limit new uses under the power contained in the original settlement, although it expressly extended to such a case, because a power of revocation and new appointment was not expressly reserved by the donees in the deed of appointment. This case, therefore, shews that the intention of the original settlors has no influence, so far, at all events, as relates to the restoration or reservation of powers which have been exercised. Assuming, then, the intention of the donees to govern the resulting of the powers, the question is, whether there is sufficient evidence of the intention in the present case that the power to the survivor should not result. It is clear that a resulting use need not be expressly negatived, but that any evidence of intention that it should not result, will be sufficient; as, for instance, if the resulting of the use would be inconsistent with any

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of the provisions contained in the deed of disposition, (see Fearne's Contingent Remainders, p. 42, and the cases of *Adams v. Savage* (a) and *Rawley v. Holland* (b) there cited), it is perfectly clear that, in this case, the resulting of the power to the survivor would be wholly inconsistent with the provisions of the deed of appointment, which expressly reserves to the donees a joint power of revocation and new appointment only. It was clearly intended that the power of new appointment should not be more extensive than the power of revocation, which required the concurrence of both donees for its exercise, the two powers, in fact, forming one entire authority. And, moreover, the special language of the deed of appointment removes all doubt upon this question. By the recitals in this deed, the parties expressly state that it is their intention to exercise "the said several powers" contained in the settlement of 1810, and, in the reservation of the joint power of new appointment, it is provided that the parties are to be at liberty jointly to new appoint "in such manner as they should think proper, and which should be warranted by the terms of the said several powers contained in the said indenture of the 29th of May, 1810." There is, therefore, a clear evidence of intention on their part to exercise all the authority they possessed under the joint and several powers, and to substitute for such powers a joint power only. *Ward v. Lenthal* may be referred to as an authority, that the resulting of the uses in a case like the present would be governed by the intention of the donees of the power. It was there decided, that, on the revocation of the appointment, the uses of the original settlement resulted exclusively of the power of revocation and new appointment. But the immediate effect of the exercise of the power of revocation was to defeat all the uses of the original settlement, and to leave the fee in the settlor, sub-

(a) 2 Salk. 679.

(b) 2 Eq. Ca. Abr. 753.

ject to the power of new appointment; and supposing no new appointment to have been made, the uses of the settlement would have been defeated. On what ground, therefore, upon an exercise of the power of new appointment and a subsequent revocation of the uses so created, did the limitations of the original settlement result? Simply on the ground that the new appointment afforded evidence that it was not the intention of the donee of the power to defeat the uses of the settlement further than was necessary to give effect to the new appointment. The foundation, therefore, of the resulting of these uses was the intention of the donee of the power. And it would not be possible to account for the revival of estates which had been expressly revoked in any other way.

Thirdly, if there be any question as to the position that the intention of the donees was sufficient to rebut the resulting of the separate power in the absence of an express appointment of the use in default of an exercise of the joint power, nevertheless an appointment to the uses of the original settlement, limited in default of an exercise of the joint or several powers of appointment, may be implied. Many authorities might be cited, in which a testator, having directed an estate to be held in trust for the children of a person as he should appoint, without making any disposition in default of appointment, a limitation to the children in default of appointment has been implied: *Morgan v. Surman* (a), *Burrough v. Philcox* (b). The donees of the power might clearly have limited the property to the uses of the original settlement in default of appointment, in the event of there being no joint appointment by them, and if they have sufficiently manifested an intention so to do, the necessary appointment to such uses may be implied. For a sufficient declaration on their

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(b) 5 My. & Cr. 73.

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part what the uses are to be, is all that is necessary for that purpose.

Willes contra.—The authorities, when considered, are in support of the defendant's title. At the time the testator made his will, the power of appointment limited to the survivor of the testator and his wife was a valid and subsisting power. By the execution of the joint power the estate in question was limited to the defendant in fee; and by the revocation, which was jointly made, the original power was revived, and existed in the same manner as if the joint appointment had never been made. It has been argued, that the intention of the donees may be taken into consideration; but the language of the grantor cannot be construed either by the words or by the acts of the donees, for such matter cannot alter the effect of the original power. The case of *Ward v. Lenthal* is distinguishable from the present, upon the grounds pointed out by Lord *St. Leonard's* in his work on Powers. The argument on the part of the plaintiff is in direct opposition to the view taken by the learned author of that treatise. In that case the donee of the power by the deed by which he revoked the uses and made new limitations, although he inserted in it a power to revoke, *yet he did not reserve a power expressly to limit new uses*; and it was held, upon that ground, that he could not limit new uses by virtue of the estate first raised. The resolution was, that where a deed is executed under a power of revocation, reserved upon the execution of a former power, no uses can be limited out of the old seisin, unless the deed containing such power of revocation also contain an express authority to limit new uses. And Lord *St. Leonard's* lays it down as a rule, to be gathered from the authorities upon this question, "that every power reserved in a deed executing a power will be strictly construed, and therefore a mere

power of revocation in such a deed will not authorise a limitation of new uses, although in certain cases the original power may be re-executed" (a). And, in treating of the point decided in *Ward v. Lenthall*, he says, "The first deed contained a power of revocation *and* new appointment; the second deed, which revoked and limited new uses, contained only a power to revoke; the third deed revoked and limited new uses, and the new uses were held to be bad. The operation of the last revocation, therefore, was not to remove the second deed out of the way altogether, and to restore the original settlement, with the power of revocation and new appointment, for in that case the latter power would have supported the new uses in the third deed; but the second deed executed the power of revocation and appointment in the first; and the third deed having revoked the second, without any power to limit new uses, the original settlement remained discharged of the power to revoke it." That case is therefore clearly distinguishable from the present; and the observations of the learned author of the work upon Powers are applicable here. It has been urged that the insertion of a joint power of appointment only by the donees of the power, affords an argument against the resulting of a separate power; but that argument is not of much weight, inasmuch as a separate power could not have been reserved in the deed of appointment. The deduction drawn from the case of *Moody v. King* appears to be rendered of little value by the later authority of *Ray v. Pung* (b): See also 2 Sugden on Powers, pp. 31, 32, 33. Here it was intended by the deed of settlement that the survivor of Mr. and Mrs. Kater should have a separate power of appointment; and by the deed of 1832 they reserved that power. The words "in *default* of such joint direction, limitation, or appointment, or in case any

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(a) 1 Sugd. on Powers, 7th edit. 462.

(b) 5 B. & Ald. 561.

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such should be made which should not be a complete disposition of the said hereditaments," and which are to be found in the deed of settlement, must be read *secundum subjectam materiem*, and mean that, in case of the death of one of the donees of the power, there not having been any complete disposition of the hereditaments, the right of the survivor to appoint shall attach. If, therefore, there has been no joint appointment, the surviving parent may exercise the power of appointment; and by the deed revoking the joint appointment the original settlement, including the several power of appointment, was fully restored, and therefore the appointment by will to the defendant was valid.

Watters in reply.—The case of *Brudenell v. Elwes* (a) is an authority that a separate power might have been inserted in the deed of appointment. In that case a separate power was reserved on a joint appointment. If in that case the original separate powers could have been held to result, that case would not have been rested upon the validity of the reservation of the separate power in the appointment. *Ray v. Pung* cannot be considered as applicable to powers of revocation and new appointment, unless it be also admitted that there is no distinction between a limitation to such uses as A. shall appoint, with a gift over in default of appointment to B., and a limitation to B., subject to be defeated by the exercise of powers of revocation and new appointment in A. And if that be so, the defendant would be precluded from availing himself of the distinction taken by Lord *St. Leonard's*, which is wholly based upon such a difference. [*Parke, B.*—I do not think that Lord *St. Leonard's* intends to rest the distinction upon the difference between a power of appointment precedent to the uses of a settlement, and a power of revocation and new appointment following such uses, but upon the ground that

(a) 1 East, 442; 7 Ves. 332.

the power to appoint is the primary object and intent of the settlors, and therefore that it is immaterial in which part of the settlement the power is inserted.] In *Ward v. Lenthal* it was the settlor's intention that the estate should stand limited to the uses of the settlement, including the power of revocation and new appointment. It was not the settlor's intention there, that, on the execution of the power of revocation and new appointment, and a subsequent revocation of the appointment, the uses, minus the powers, should result, and yet such intention was not sufficient to restore the powers which had been fully exercised. The same observation also applies to *Hele v. Bond*, for there the original settlors expressly stated it to be their intention that the original power of revocation and new appointment should revive after an execution of the power and a subsequent revocation of the appointment, and yet that intention, which was so clearly expressed, was held to be insufficient to restore the powers.

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Cur. adv. vult.

The judgment of the Court was now delivered by

ALDERSON, B.—This was a special verdict, stating that the defendant, under a contract made with Mr. Fountayne Wilson, did deliver to his solicitor, on the 30th of September, 1843, an abstract of his title of certain land and premises.

The question is, whether the defendant could, supposing the facts stated in that abstract to be true, make a good title to these premises.

The title depended on a settlement made on the 28th and 29th of May, 1810, by lease and release. It appeared that the premises in question were at that time limited to Frances E. Reeve, widow, for life, with remainder in fee to Mary F. Reeve, spinster; and by the settlement before mentioned, which was made on the marriage of Miss Reeve with

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Henry Kater, they were settled to the use of Henry Kater for life without impeachment of waste, remainder to the use of Mary F. Reeve his wife for her life in like manner, with remainder to the use of all or any, or such one or more of the children of the marriage, either exclusively, or in such parts, shares, or proportions, and for such estate or estates, interest or interests, and with such limitations or remainders over, and charged or chargeable with the payment of such yearly sum or sums of money, such limitations and remainders, and charges, nevertheless, being for the benefit of the said children, and at such ages and times, and in such manner as they the said Henry Kater and Mary F. Kater should, from time to time, by any deed or deeds, writing or writings, with or without power of revocation and new appointment, to be by them respectively sealed and delivered in the presence of two witnesses, direct, limit, or appoint. And in default of such joint direction, limitation, or appointment, or in case any such should be made which should not be a complete disposition of the said hereditaments thereby settled, then, as the survivor of them, the said Henry Kater and Mary F. Kater by deed executed as aforesaid, or by will or codicil published in the presence of three witnesses, should direct, limit, and appoint.

The settlement then proceeded in default of such appointment, joint or several, to limit the hereditaments in a way which, under the circumstances of the case, would give the title to the elder brother of the present defendant. It is not material to state these limitations more at length, because nothing turns upon them.

There were two children of this marriage, Herman Kater, and Edward Kater the defendant.

The abstract then proceeded to state, that, by a deed dated the 15th of October, 1832, properly executed, Henry Kater and Mary F. Kater, after reciting that they had resolved to exercise the several powers given to or created in

them by virtue of the settlement, did, in exercise and execution of the power and authority reserved to them by the settlement, and of every other power and authority them in that behalf enabling, direct, limit, and appoint the premises, subject to their own life estates, to Edward Kater (the defendant) in fee. This deed contained a power of joint revocation of the uses therein limited, and a power of joint appointment of the whole or any part of the hereditaments to new uses, and with like power of revocation and new appointment reserved to Henry Kater and Mary F. Kater, as they might think proper, subject however to the same restrictions as were contained in the original settlement.

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The abstract then set out another deed, dated 4th of February, 1833, by which Henry Kater and Mary F. Kater jointly revoked the uses contained in the deed dated the 15th of October, 1832, but made no new appointment at all.

On the 19th of February, 1833, Mrs. Kater died; and on the 24th of May, 1833, Henry Kater the survivor duly made his will, and published it in the presence of three witnesses, and after reciting the powers reserved to him by the settlement of the 28th and 29th of May, 1810, did, in execution of the powers vested in him, limit, direct, and appoint the hereditaments in question to Edward Kater the defendant in fee.

Henry Kater died, and his will was proved on the 12th of May, 1835.

The question now arises on these facts, whether Edward Kater the defendant has the fee simple of the hereditaments vested in him. If he has, the judgment should be given for the defendant; if not, for the plaintiff.

The question depends on the validity of the appointment made by Henry Kater's will. After much consideration, we have arrived at the conclusion that the appointment was valid, and that the defendant is entitled to our judgment. It was contended by the counsel for the plaintiff,

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that, by the execution of the power jointly by Mr. and Mrs. Kater, the whole power was executed; and that any valid limitation afterwards must arise out of the execution of those powers which they chose to reserve to themselves in that deed; and that, as they had not exercised them, except by revoking that appointment, the original power was exhausted and gone altogether, and no power remained in the survivor to appoint at all; and, for this purpose, the leading case of *Ward v. Lenthal* (a) was cited. In that case, a man levied a fine to uses, with a power of revocation and limitation of new uses; and by a second deed he revoked the same, and limited new uses, but therein reserved to himself only a power to revoke. By a third indenture he did revoke the uses of the second indenture, and limited new ones. The Court there resolved, that, where powers of revocation and new appointment are given, the donee may revoke and limit new uses toties quoties, and all the estates shall be raised out of the first seisin. But if, in any indenture by which he thus declares new uses, he reserves a power to revoke, and does not reserve a power expressly to limit new uses, he can only revoke, and cannot limit new uses by virtue of the estate first raised. Lord *St. Leonard's*, in observing on this case, says, that this case seems to depend on the ground in *Hele v. Bond*, the principle of which is, that an instrument exercising a power must expressly reserve the very powers intended to be retained.

But we think, after much consideration, that this case does not govern the present question.

There, the uses originally limited by the settlement, were revoked by the power, and new uses appointed in the exercise of that power, with only a power of revocation reserved. It is unnecessary to say, what would have been the effect, if the second deed had been simply revoked.

(a) 1 Sid. 343; 2 Keb. 269.

Possibly, the original revoked uses might have been revived. But this was not done, for the deed of revocation appointed new uses, shewing clearly that the revocation was not to revive the old uses. And the new uses failed, because there was no power reserved by the second deed for that purpose. But that is not the case here. Here, by the settlement, a power of appointment is given to the husband and wife jointly to limit the estate amongst the children. They are not to revoke any of the uses of the settlement at all; nor have they done so. Having made this joint appointment, they have revoked it simply. We think that, in so doing, they restored the original settlement entirely; and we find it thus stated by Lord *St. Leonard's* in treating on Powers, Vol. I, p. 481, citing, as his authority, with approbation Mr. Preston's very learned book on Abstracts, p. 277, that, "where a man has a power of appointment, and exercises that power, with the addition of a power of revocation, this power is annexed to the uses introduced into the appointment; and by revoking the uses contained in the deed of appointment *there will be a revival of the original uses, and amongst them of the power of appointment. The effect of the revocation will be to revive the original power, so that it may be exercised again and again.*"

Lord *St. Leonard's* afterwards adds, and we cannot do better than quote his very words—"If the original power be a general primary one, and the estate be settled only in default of and until its execution,"—which is the case here as we think—"a new appointment with a power of revocation only, and a subsequent exercise of that power would, it is apprehended, restore the original settlement, and with it the general power of appointment, which would effectuate the intention. For, in such case, the original power of appointment in its creation overrides all the other uses and comes in lieu of the fee. It cannot be treated as a

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mere power to defeat a settlement, for it is itself the immediate and the leading object of the settlement."

We think this distinction between this case and that of *Ward v. Lenthal* decides the question in favour of the defendant.

By the execution of the joint power, the estate was limited to the defendant in fee. The revocation of that appointment, also jointly made, revived the original power of joint appointment, and with it the dependent power of appointment by the survivor in case of default. The case then stands exactly as if the first joint appointment had never been made. Then, if so, the subsequent non-exercise of that existing joint power was clearly a default in executing such joint power. The consequence is, that in that event the power came to the survivor, which power Mr. Kater the survivor has duly exercised in this case. Mr. *Watters* made another point, that, inasmuch as in the first joint appointment the husband and wife did not expressly reserve to themselves any power of appointment to the survivor, they had shewn their intention of limiting the future appointment to themselves jointly, and so had finally put an end to the power of appointment to the survivor. But even if it should be so construed as to shew such an intention on their part, which we doubt, we still think that the settlement gave them no power to do this, and that this point also fails.

We are glad to be able to come to this conclusion, that the appointment by the survivor is valid; for this fully effectuates the very clear and primary intention of the parties to this settlement.

We think the judgment must be for the defendant.

Judgment for the defendant (a).

(a) See *Evans v. Saunders*, 3 Drew. 415.

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IN THE EXCHEQUER CHAMBER.

(In Error from the Court of Exchequer).

HAYLING v. OKEY and Others.

Feb. 2.

ERROR on a judgment (a) of the Court of Exchequer for the defendants. The action was trespass, for assaulting the plaintiff and damaging his clothes. Plea,—That one Walter de Winton was possessed of a dwelling-house, situate in the parish of Sandhurst, in the county of Gloucester, and the plaintiff was unlawfully in the dwelling-house,

Trespass for assault. Plea, that the defendants, as the servants of W. and by his command, committed the trespass in defence of the possession and quiet enjoyment of his dwelling-house.

New assignment, that the trespasses were committed out of and in a different place from the dwelling-house, to wit, in and upon a certain bridge in a certain farm, and in divers, to wit, two yards, two fields, and two folds, of and in the same farm, and for another and different purpose. Plea to new assignment, that W. was possessed of the dwelling-house, and also of the bridge, yards, fields, and folds which belonged and were adjacent to the dwelling-house; and that the defendants committed the trespasses newly assigned in defence of the possession of the dwelling-house, bridge, yards, fields, and folds; and that they removed the plaintiff from them, and took him by the nearest and most direct way to a certain public highway near to the dwelling-house, bridge, yards, fields, and folds; and because they could not conveniently remove the plaintiff to such highway without passing over and across the said bridge, yards, fields, and folds, they, at the time in the new assignment mentioned, necessarily and unavoidably led him over them. Replication, that W. was seized of the farm, and demised it to J. as tenant from year to year; that J. entered, and, being indebted to B., assigned to him, amongst other things, all the growing and other crops which then were or might thereafter be found in and about the farm, as a security for the debt, with a power for B., in default of payment, to take possession; that B. made default; that the bridge, yards, fields, and folds, in the new assignment mentioned, and also a certain garden, were parcel of the farm demised to J.; that, at the time in the new assignment mentioned, W. was possessed of the garden and fields in which there were growing and other crops belonging to J.; that while J. was in possession, the plaintiff, as the servant of B., entered and took possession, and continued in possession, of the growing crops, until W. became possessed of the bridge, yards, fields, and folds, and of the garden; and that the plaintiff was removed by the defendants from and off the bridge, &c., before a reasonable time had elapsed, and while the debt remained unpaid; and the defendants dragged the plaintiff from the dwelling house along the bridge, and across the yards, fields, and folds, to the highway. On demurrer to the replication:—*Held*, in the Exchequer Chamber, first, that the plea to the new assignment was good, since it confessed and justified the trespasses therein alleged, namely, those committed on the bridge, yards, fields, and folds; and that the stating in the plea that the defendants removed the plaintiff to the highway, did not render that a part of the cause of action which it was necessary to justify, but was mere surplusage.

Secondly, that the replication was bad in substance, since it did not shew any right in B. to retain possession of the premises after J.'s tenancy had ended.

(a) The case was argued in the Court of Exchequer on the 28th of April, 1852, by *Macnamara* for the plaintiff, and *H. J. Hodgson* for the defendants; and the

Court, after taking time to consider, gave judgment for the defendants, without stating any reasons for their decision.

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making a noise and disturbance, without the leave and against the will of the said Walter de Winton; and thereupon the defendants, as the servants of the said Walter de Winton and by his command, requested the plaintiff to cease making his said noise, &c., and to go from and out of the said dwelling-house, which the plaintiff refused to do; whereupon the defendants, as the servants of the said Walter de Winton and by his command, and in defence of his possession of the said dwelling-house, gently laid hands upon the plaintiff, for the purpose of removing, and did then remove, the plaintiff from and out of the said dwelling-house, &c.; quæ sunt eadem.—Verification.

New assignment.—That the defendant committed the trespasses out of and in a different place from the said dwelling-house, to wit, in and upon a certain bridge, in a certain farm, called Bengrove Farm, in the parish of Sandhurst, in the county of Gloucester, and in divers, to wit, two yards, two fields, and two folds of and in the said farm, and for another and different purpose than the purpose in the said plea mentioned, and after the defendants had removed the plaintiff from the said dwelling-house as in that plea mentioned.—Verification.

Plea to new assignment.—That before and at the time of the committing of the trespasses above newly assigned, the said Walter de Winton was lawfully possessed of the said dwelling-house, and also of the said bridge, yards, fields, and folds, in the new assignment mentioned, which said bridge, yards, fields, and folds, belonged and appertained to the said dwelling-house, and were adjacent thereto: and the said Walter de Winton being so possessed thereof, the plaintiff, just before the said time when &c., in the new assignment mentioned, to wit, on &c., was unlawfully in the said dwelling-house, and with force and arms making a great noise, and disturbing the said Walter de Winton in his possession of the said dwelling-house, and of his said bridge, yards, fields, and folds, without the leave

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or license and against the will of the said Walter de Winton; and thereupon the defendants, as the servants of the said Walter de Winton, and by his command, then requested the plaintiff to cease making such noise and disturbance, and to go and depart out of the said dwelling-house, and from and out of the said bridge, yards, fields, and folds, which the plaintiff then wholly refused to do; whereupon the defendants, as the servants of the said Walter de Winton, and by his command, and in defence of his possession of the said dwelling-house, and of the said bridge, yards, fields, and folds, then removed the plaintiff to the outside of the said dwelling-house, as in the said plea above mentioned, and also then gently laid their hands upon the plaintiff for the purpose of removing, and did then remove, him from and off the said bridge, yards, fields, and folds, *and did then take him by the nearest and most direct way to a certain public highway, near to the said dwelling-house, bridge, yards, fields, and folds, as they lawfully might for the cause aforesaid; and because the defendants could not conveniently take and remove the plaintiff to such highway as aforesaid, without passing over and across the said bridge, and over and across the said yards, fields, and folds; the defendants did, at the time when &c., in the new assignment mentioned, necessarily and unavoidably, and for the purpose aforesaid, lead the plaintiff over and across the said yards, fields, and folds, and thereby then unavoidably committed the several trespasses above newly assigned, in and upon the said bridge, and in the said yards, fields, and folds, doing no unnecessary damage, &c.; quæ sunt eadem.*—Verification.

Replication to plea to new assignment.—That, before the said time when &c., in the new assignment mentioned, Walter de Winton was seised in his demesne as of fee of and in a certain dwelling-house, farm, and lands, called Bengrove Farm, in the parish of Sandhurst, in the county of Gloucester; and being so seised, by an agreement in writ-

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ing then made between Walter de Winton of the one part, and one Robert James of the other part, Walter de Winton demised the Bengrove Farm to R. James, to have and to hold for a certain term, to wit, for one year then next ensuing, and so on from year to year for so long a time as Walter de Winton and R. James should respectively please; by virtue of which demise, R. James afterwards entered into and upon the said farm, and became and was possessed thereof for the said term. That R. James, after the making of the agreement, and whilst he was possessed of the said farm, and during the continuance of the said term, was also possessed of household furniture, live and dead stock, *growing and other crops*, &c. That, by a certain indenture made between R. James of the one part, and J. Brewer of the other part (profert), after reciting (inter alia) that R. James was indebted to J. Brewer in the sum of 138*l.* for money lent, and that R. James, having occasion for the further sum of 94*l.*, had requested J. Brewer to lend him the same, which J. Brewer had agreed to do upon having the repayment thereof and also the 138*l.* secured to him in the manner thereafter contained, R. James, in pursuance of the agreement, and in consideration of the debt of 138*l.*, and of the further sum of 94*l.* then paid by J. Brewer to R. James, the receipt whereof he did thereby acknowledge &c., R. James did grant, bargain, sell, assign, transfer, and set over unto J. Brewer all and singular the household furniture, live and dead stock, *growing and other crops*, &c., belonging to him R. James, which were then in and about the said dwelling-house, farm, and lands, then in the occupation of R. James; and also all and singular the household furniture, live and dead stock, *growing and other crops*, of R. James, which might be acquired by him subsequent to the execution of the indenture, or which might happen to be found in, upon, or about the dwelling-house, farm, and lands, or any part or parts thereof, at any time from time to time thereafter, when the indenture might be

put in force, until the whole amount due to J. Brewer should be fully paid; To have and to hold the said household furniture, live and dead stock, growing and other crops, &c., thereby assigned unto J. Brewer, his executors, &c., as and for his and their own proper goods and chattels. (Then followed a proviso, rendering the indenture void on payment of the principal money and interest on a certain day.) And it was thereby agreed, that, after default in payment of the sum of 232*l.* and interest, it should be lawful for J. Brewer, his executors, &c., peaceably and quietly to receive and take into his or their own possession, and hold and enjoy all and every the said household furniture, live and dead stock, growing and other crops, &c., thereby respectively assigned; and also all and every kind of household furniture, live and dead stock, growing and other crops, which might be acquired by, and might belong to, R. James after the execution by him of the said indenture, and to be found in and about the dwelling-house, farm, and lands, at any time or times and from time to time thereafter, when the indenture should be put in force.—(The replication then alleged a demand and default in payment of the principal money and interest.)—That the said bridge, yards, fields, and folds, in the new assignment mentioned, at the time of the making of the indenture, and from thence until and at the said time when &c., and also a certain garden, were in and upon and parcel of the Bengrove Farm, demised by the agreement to R. James, and the only way and means of access to and from the said garden from and to the highway was by, over, and across the said bridge; and that there was a way or road to and from the highway through and across the said yards, fields, and folds, from and to the said bridge, and also from and to certain other fields, which were parcel of the Bengrove Farm; and the said road or way was the most direct and convenient way to and from the highway from and to the bridge and from

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and to the last-mentioned fields. That, at the time when &c., in the new assignment mentioned, Walter de Winton was also possessed of the said garden and last-mentioned fields, and there were certain growing and other crops in the said garden and fields, which, at the time of the execution of the indenture, belonged to R. James, and were then in, about, and belonging to the said farm and lands, and included in the indenture; and that, after default and while the money was due, there were certain other growing and other crops in the said garden and fields, which had been acquired by and belonged to R. James subsequently to the execution of the indenture; and while the said several crops were in the said garden and fields, and while the principal money and interest were due and in arrear, and during the continuance of the term so granted of the Bengrove Farm to R. James, and while R. James was in possession of the farm under the demise, and before Walter de Winton was possessed of the said bridge, yards, fields, and folds, as in the plea and new assignment mentioned, and of the garden and other fields in which the said growing and other crops were as aforesaid, and before the time when &c., in the new assignment mentioned, to wit, on &c., the plaintiff, as the servant of J. Brewer and by his command, and for the purpose of receiving and taking into the plaintiff's possession, and of holding the said growing and other crops for and on behalf and as the servant of J. Brewer, under and by virtue of the said indenture, did enter into the said garden and the said other fields in which the said growing and other crops were as aforesaid, and for the purpose aforesaid took possession of the said growing and other crops, and continued in possession thereof for the purpose aforesaid from the time of his so entering until and at the time when &c., in the new assignment mentioned, and until and after the said Walter de Winton became and was possessed of the said bridge, yards, fields, and folds, as in the plea and new as-

signment mentioned, and of the garden and other fields as aforesaid, the same being a reasonable time in that behalf, and that the plaintiff was removed by the defendants from and off the said bridge, yards, fields, and folds, as in the plea to the new assignment mentioned, before such reasonable time had elapsed, and while the principal money and interest remained due.—The replication then stated, that, although, before the defendants began to remove the plaintiff, he produced to them the indenture, and gave them notice that he was in possession of the growing and other crops under it, yet the defendants would not allow the plaintiff to remain in possession of the growing and other crops, or to go to the garden or fields for the purpose aforesaid, but assaulted and dragged the plaintiff from the dwelling-house upon and along the said bridge and the said way or road through and across the said yards, fields, and folds, to the said public highway, and did not leave hold of the plaintiff from the time they removed him from the dwelling-house until they took him to and upon the highway, but continued assaulting, dragging, and holding him all the way from the dwelling-house to the highway, &c.—Verification.

Demurrer and joinder therein (a).

Macnamara argued for the plaintiff (b) in last Michaelmas vacation (Nov. 29).—First, the plea is bad in substance, on the ground that the justification is not commensurate with the assault. The cause of action being trespass to the person, the *place* is not material, either to the declaration or new assignment. Under the latter, it would be sufficient for the plaintiff to prove that the assault was

(a) The defendants demurred specially on several grounds; but as the Court held the replication bad in substance, it is unnecessary to advert to them.

(b) Before *Coleridge, J., Maule, J., Wightman, J., Cresswell, J., Erle, J., Williams, J., Talfourd, J., Crompton, J.*

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committed out of the dwelling-house, and for a different purpose than that of removing the defendant from it. The plea, however, to the new assignment is one of local justification, being in defence of possession; and, consequently, there the *place* is material. Formerly, when the cause of action was transitory, and the justification was laid in another county than that mentioned in the declaration, though issue was joined on the cause of justification and not on the locality, the *venire facias* would have been awarded into the county mentioned in the plea: 2 Wms Saund. 5 d, note. This plea shews no justification for taking the plaintiff to the highway: it does not allege that the highway was the only or the nearest way by which the plaintiff could be removed; or even that the highway adjoined De Winton's land, but only that it was near thereto. The new assignment and plea taken together amount to this,—that the defendants assaulted the plaintiff from a certain house to a certain highway, and the defendants justify the assault from the house to some place near the highway. The replication fortifies the objection, the gist of it being, that the defendants dragged the plaintiff all the way from the dwelling-house to the highway, without any right to take him to the highway. *Bush v. Parker* (a) and *Reece v. Taylor* (b) are authorities to shew that this plea is bad.

Secondly, the replication is good. The plaintiff had a right to enter under the deed; and therefore, *primâ facie*, a right to remain on the premises a reasonable time in order to remove the crops. It is true, that while he was in possession the tenant transferred his interest in the premises to his landlord; but that did not necessarily affect the plaintiff. If the transfer took place under such circumstances as to divest the plaintiff's *primâ facie* right to remain on the premises, that should have been stated by

(a) 1 Bing. N. C. 72.

(b) 4 N. & M. 469.

way of rejoinder. The term may have been surrendered to the landlord, in which case, although as between the parties it would be extinguished, it might nevertheless have a continuance so as to uphold a prior interest granted under it: *Doe d. Beadon v. Pyke* (a), Co. Litt. 338. b.; or it may have been determined by notice to quit from the landlord, in which case the tenant or his grantee would be entitled to enter and take the crops as emblements: *Coote's Landlord and Tenant*, 418; *Kingsbury v. Collins* (b).

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H. J. Hodgson for the defendants.—First, as to the plea. The new assignment specifies the places where the assault was committed; and that is binding on the plaintiff. The plea justifies all the trespasses newly assigned. The allegation that the defendants took the plaintiff by the nearest and most direct way to the highway is mere surplusage. If the plaintiff intended to rely on any additional trespass, he should have again new assigned. A plaintiff can only recover in respect of the grievance of which he complains, and not in respect of a cause of action disclosed in a plea: *Marsh v. Bulteel* (c), *Scott v. Dixon* (d). It is sufficient if the plea answers the gist of the action; and if the plaintiff relies upon matter of aggravation, he must new assign it: *Taylor v. Cole* (e), *Pratt v. Pratt* (f). The plaintiff, by replying to the plea, admits that it *prima facie* justifies all the trespasses alleged in the new assignment: *Bracegirdle v. Peacock* (g), *Luke v. Helmer* (h), *Rigeway's case* (i). The replication does not aver that there was any intervening space between the highway and the outermost field; and upon these pleadings it must be presumed, that the highway was the nearest place to which the plaintiff

(a) 5 M. & Selw. 146.

(b) 4 Bing. 202.

(c) 5 B. & Ald. 507.

(d) 2 Wils. 3.

(e) 3 T. R. 292.

(f) 2 Exch. 413.

(g) 8 Q. B. 174.

(h) Fort. 377.

(i) 3 Rep. 52.

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could be removed without rendering him a trespasser on other lands.

Secondly, the replication is bad in substance.—James's tenancy and right of possession having terminated, the plaintiff was *prima facie* a trespasser, and therefore bound to make out his right to go upon the land. For that purpose, it was incumbent on him to shew that the tenancy was determined in such a way as entitled Brewer to remove the crops. No doubt, as regards strangers, an estate voluntarily surrendered has, in consideration of law, a continuance: Co. Litt. 338. But if in this case such a surrender is relied on, it should have been alleged in the replication. As against the party pleading it, the replication may be construed so as to support the landlord's possession, that is, by assuming that the tenancy was determined by a notice to quit. Then it is said that there was a right to take the crops as emblements. But, in the first place, it does not appear that the crops were such as would, in their nature, be the subject of emblements. In order to come within the definition of emblements, they must be *fructus industriales*: Williams on Executors, 596, 598; Amos on Fixtures, 206; and it is consistent with all that appears on this record that the crops were growing crops of grass. Emblements cannot be claimed in crops which take more than a year to arrive at maturity: *Graves v. Weld* (a). *Kingsbury v. Collins* (b), which is apparently an authority to the contrary, cannot be supported. Moreover, the replication does not shew that the interest of James was such as to entitle him to emblements. He may have had a lease for a term certain; and even admitting that he was only tenant from year to year, there is no authority that the doctrine of emblements applies to such a tenancy. It is the uncertainty of the estate which gives the right to emblements; and therefore the represen-

(a) 5 B. & Ad. 105.

(b) 4 Bing. 202.

tatives of a tenant for life are entitled to them, but not a tenant for years, unless he is lessee of a tenant for life: Co. Litt. 55. b., 2 Blac. Com. 122, 145. A tenancy from year to year is not an estate of uncertain duration, for it continues until determined by six months' notice expiring at the end of the current year; whereas the right to emblements depends upon the termination of the tenancy by a sudden and unforeseen contingency. The 14 & 15 Vict. c. 25, having given to tenants additional rights in lieu of their claim to emblements, it is evidently the policy of the legislature that the doctrine should not be extended.

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Macnamara replied.

Cur. adv. vult.

The judgment of the Court was now delivered by

COLERIDGE, J.—In this case judgment passed for the defendants below upon the replication to the plea to a new assignment; and upon the argument before us in error, it was contended, first, that the plea itself was bad. The declaration was in trespass for an assault and injury to the plaintiff's clothing: the plea justified the trespass as in defence of the possession and quiet enjoyment of the dwelling-house of one Walter de Winton, and by his command. The new assignment stated the trespasses to have been committed "out of and in a different place from the dwelling-house, to wit, in and upon a certain bridge in a certain farm called Bengrove Farm, in the parish of Sandhurst, in the county of Gloucester, and in divers, to wit, two yards, two fields, and two folds, of and in the same farm, and for another and different purpose."

The plea to the new assignment, on which the first question arises, states the possession by the said Walter de Winton of the dwelling-house, and also of the said bridge, yards, fields, and folds, in the new assignment mentioned, which

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belonged and appertained to the said dwelling-house and were adjacent thereto; it then justifies the trespasses newly assigned as in defence of his possession of the dwelling-house, bridge, yards, fields, and folds, by removing the plaintiff from them.

It it had stopped there, no objection that we are aware of (except, perhaps, in point of form) could have been made to it; but it goes on to allege, that the defendants "did then take the plaintiff by the nearest and most direct way to a certain public highway near to the said dwelling-house, bridge, yards, fields, and folds, as they lawfully might for the cause aforesaid; and because they could not conveniently remove the plaintiff to such highway, without passing over and across the said bridge, yards, fields, and folds, they did, at the time when &c. in the new assignment mentioned, necessarily and for the purpose aforesaid, lead him over and across the bridge, yards, fields, and folds, and so committed the trespasses newly assigned." The objection relied on by the plaintiff is this, that the places in which the trespasses are alleged by the new assignment to have been committed, are immaterial, being laid under a videlicet; that the plea, therefore, by introducing a new trespass in taking the plaintiff to the highway, has made that a part of the cause of action which it was necessary to justify; and that the plea shews no justification extending to that, because it does not shew that the highway adjoined either the dwelling-house, bridge, yards, fields, or folds, or that, in order to the removal from them, it was necessary to take the plaintiff to the highway. Assuming, however, that the new assignment does not make the places mentioned in it material, except so far as that it excludes the place mentioned in the original plea (that is, the dwelling-house), and that those places are made material for the first time by the plea to the new assignment, which relies on a local justification, it is plain that the plea only intends to confess trespasses committed on the bridge, yards, fields,

and folds, and to justify them as committed in defence of Walter de Winton's possession of them. With these, the removal to the highway has on the face of the plea no necessary connection, and the confession of it may be regarded as mere surplusage. Suppose that, instead of replying as he has done new matter, the plaintiff had replied *de injuriâ*, all that would have been in issue would have been so much of the justification as applied to the trespasses in and upon the bridge, yards, fields, and folds, which shews that that only is the material part of the plea. For this *Atkinson v. Warne* (a) is an authority—where the declaration charged one assault, the plea confessed and justified that and also a second, and the plaintiff replied *de injuriâ*: on the trial, the justification to the first assault was proved, but no evidence was offered in support of that to the second; and it was held, that the plea was sustained. *Davis v. Chapman* (b) is in point to the same effect. Nor do we think it material that the plea alleges the taking over the places named in it as done in order to remove the plaintiff to the highway, without shewing any necessity for such removal, because the plea alleges a good cause for all the trespasses of which the plaintiff complains.

It is necessary, therefore, to consider the goodness of the replication. This commences with stating the seisin of Walter de Winton in Bengrove Farm, and a demise of it by him to one Robert James, as tenant from year to year, determinable, in the usual way, at the pleasure of either; that James thereupon became possessed, and, being so possessed, and indebted to one Brewer in a certain sum, and being desirous of a further advance, by indenture granted to him, among other things, all the growing and other crops then in and about the Bengrove Farm, and all articles and things of the same description as those before enumerated which might be subsequently acquired by him, or

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(a) 1 C. M. & R. 827.

(b) 2 M. & Gr. 921.

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which might be found in, upon, or about the same premises from time to time thereafter, until and when the indenture should, under the conditions contained in it, be put in force. The grant was as a security for the principal and interest; and the instrument contained power for Brewer, on default in payment after notice, peaceably to take the crops into his own possession, the subsequently acquired property and growing and other crops being specially included. The replication then shewed a default in payment, and a right, as between James and Brewer, for the latter to put the deed in force, and averred that the bridge, yards, fields, and folds, in the new assignment mentioned, and also a certain garden, were in and upon and parcel of the farm demised to James, and that the only way of access to and from the garden, from and to the said highway, was by and over the bridge, and that there was a way from the highway across the said yards, fields, and folds, from and to the said bridge, and from and to certain other fields, parcel of the same farm, and that this was the more direct and convenient way to and from the highway from and to the said bridge, and from and to the said fields. It then states, that at the time in the new assignment mentioned, Walter de Winton was also possessed of the garden and last-mentioned fields, in which there were growing and other crops, belonging, at the execution of the indenture, to James, and included in the indenture, and also other subsequently growing and other crops, acquired by and belonging to James after the date of the indenture. It then states, that, during the continuance of the term, and while James was in possession, and before Walter de Winton was possessed, the plaintiff, as Brewer's servant, entered and took possession, and continued in possession of the said growing crops until and after Walter de Winton became possessed of the bridge, yards, fields, and folds, as in the plea mentioned, and of the garden and other fields last mentioned, the same being a reasonable time;

and that he was removed by the defendants from and off the bridge, &c., as in the plea mentioned, before a reasonable time had elapsed, and while the debt remained unpaid, and although he produced the indenture, and gave the defendants notice of the purpose for which he was in possession.

This replication, therefore, stands upon the right of a person claiming under the tenant from year to year, who has entered during the tenancy, in order to possess himself, by grant from him, of growing crops, the property of the tenant at the time of the entry, to remain on the premises and retain possession of such crops after the tenancy has expired, and after the landlord has resumed possession. But it does not state how the tenancy had come to an end; and there is no presumption as to a determination by the landlord, rather than by the tenant; nor does it shew the kind of crops, nor allege any continuing title to them in the tenant after the expiration of the tenancy; nor does it shew, supposing even that Brewer was entitled to them after the interest of the tenant in the premises had determined, that they were ripe or fit for harvesting, or that, in their present state, they needed any care or cultivation for which the plaintiff's continuing in possession was necessary. If, therefore, his right to be on the premises depended on any circumstance of this kind, the replication is defective for not stating it, because it is clear, that the party who insists on remaining upon the land of another against his will, and therefore *primâ facie* against right, ought to shew all the circumstances which make such possession lawful, and abridge the general rights of property. Unless Brewer was entitled to remain on the premises and retain possession against the will of the owner, after James's tenancy had ended, independently of such special circumstances as we have alluded to (without expressing any opinion whether these or any of them would have

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availed), the replication shews no sufficient title; and we are clearly of opinion that he was not. We think, therefore, that the judgment of the Court below was right, and ought to be affirmed.

Judgment affirmed.

Feb. 7.

ELLIS v. LAFONE and Another.

In February, 1847, the plaintiffs chartered a vessel at Monte Video to proceed to the Falkland Islands, and thence to Santa Cruz, and there load a cargo of guano, and discharge it at a port in Europe, freight to be paid at the rate of 250*l.* per month, and one month's pay to be paid when the vessel sailed from the Falkland Islands, and the balance on the delivery of the cargo at the port of discharge. The

vessel sailed from Monte Video, and arrived at the Falkland Islands with a cargo, which was there safely delivered. While there, the plaintiffs paid the captain 250*l.* for one month's pay, as agreed by the charter-party. The vessel then proceeded to Santa Cruz, and loaded some guano, with which she returned to Monte Video, where she completed her cargo by taking in a quantity of hides. In October, 1847, whilst the vessel was at Monte Video, the plaintiffs entered into a new charter-party, by which the vessel was to proceed with the cargo then on board to Havre, freight to be paid at the rate of 250*l.* per month, the time to commence from the 26th of March last: freight to be paid at the port of discharge, after deduction of 250*l.*, which it was stated the captain received on account of that charter-party. In December, 1847, the agent of the plaintiffs, by their direction, effected with the defendant a policy of insurance, "lost or not lost from Monte Video to Havre on 450*l.* freight advanced." The vessel and cargo were totally lost on the voyage from Monte Video to Havre:—*Held*, in the Exchequer Chamber, first, that the plaintiffs had an insurable interest, and were entitled to recover on the policy the 250*l.* as freight advanced, since that was not a separate sum due on the arrival of the vessel at the Falkland Islands, but a portion of the entire amount payable for the whole voyage; and, as the parties, by entering into the second charter-party, had annulled the first, and had agreed to treat the 250*l.* as paid under the second charter-party, that sum still remained at risk.

Secondly, that there was no misdescription of the plaintiffs' interest in the policy.

ERROR on a bill of exceptions.—The declaration stated, that the plaintiffs made a policy of insurance, "lost or not lost, at and from Monte Video to Havre," upon goods and merchandize, and also upon the ship "Napoleon;" that the ship, goods, and merchandize "were and should be valued at—on 450*l.*, being freight advanced," &c. It then stated the payment of the premium, and that the defendant subscribed the policy, and that divers goods of the plaintiffs' were on board the said ship to be carried "from Monte Video to Havre, to wit, on freight; and the plaintiffs advanced and paid to L. Backer, as and then being the master of the said ship or vessel, the sum of 450*l.* for freight, to wit, for the carrying and conveying of the said goods on board the said ship or vessel, on the said voyage from Monte Video to Havre." It then stated mutual promises; that the plaintiffs were interested in the goods and

freight advanced; that the ship sailed from Monte Video on her voyage towards Havre, and while proceeding thither was wholly lost, whereby the plaintiffs lost the freight so advanced, &c. Breach, nonpayment of the sum insured.

Pleas (inter alia).—First, non-assumpsit; secondly, that the plaintiffs did not advance or pay the said sum of 450*l.*, or any part thereof, for freight for the carrying or conveying of the said goods or any of them, or any part thereof, on board the said ship or vessel on the said voyage from Monte Video to Havre, modo et formâ. Thirdly, that the plaintiffs were not, nor was either of them, interested in the said premises insured by the policy or any part thereof, modo et formâ. Fourthly, that the defendant subscribed the policy after the ship had sailed from Monte Video on the said voyage; and that the subscription of the defendant was obtained from him by the misrepresentation of the plaintiffs in a certain material particular, to wit, and in this, that the ship was falsely represented to the defendant by the agent of the plaintiffs to be then loaded with hides for her said voyage, whereas a large portion of the cargo consisted of guano.—Verification. Sixthly, that the subscription of the defendant was obtained from him by the concealment of a fact material to be known by the defendant, and which, if communicated, would have raised the rate of premium, to wit, that a great part of the cargo consisted of guano; and also by the concealment of another fact, material to be known, &c., to wit, that the vessel, before the time of procuring the policy and subscription, had sailed and was then proceeding on a voyage from the coast of Patagonia to a port in Europe, having then on board a cargo of guano, which had been loaded on the coast of Patagonia, to be carried to a port in Europe.—Verification. The plaintiffs joined issue on the four first pleas, and to the fifth and sixth replied de injuriâ.

The cause was tried before *Pollock*, C. B., at the London Sittings after Michaelmas Term, 1849, when the following evidence was adduced on behalf of the plaintiffs.

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The Napoleon had been chartered by the plaintiffs at Monte Video, on the 10th of February, 1847, under a charter-party of that date, which had been executed by Lars Backer, the captain of the said vessel, the material provisions of which are as follows:—

“Charter-party.—Monte Video, 10th February, 1847.

—This charter-party witnesseth, that it is this day mutually agreed between Lars Backer, master of the Norwegian barque, *Æ* at Lloyd’s, ‘*Napoleon*,’ of Christiana, &c., now at anchor in this port, and Samuel F. Lafone, Esq., merchant and charterer, that the said vessel, being tight, strong, &c., shall proceed, in conformity with orders to be given to the master by the charterer or his agent, to a port or ports in the Falkland Islands, and thence to Port Santa Cruz, in Patagonia, and there load a full and complete cargo of dried guano or other merchandize, which the above charterer hereby engages to furnish to this said vessel (such cargo to be laden and unladen, as the charterer may direct, in this port and at the Falklands, not exceeding what he can reasonably stow and carry over and above her cabin and necessary and customary room for the crew, sails, cables, and provisions), and being so laden, shall sail for Falmouth for orders, if so required; and in conformity shall proceed to discharge at a port in Europe, or so near thereunto as she may safely get, and deliver the same in conformity with the bills of lading; freight to be paid at the following rate: 250*l.* sterling money per month, free of port charges, pilotages, stevadore’s expenses, if required, and commissions (after the vessel leaves this port), which are in full for account of the charterer, excepting those at the final port of discharge which are for account of the vessel; the time is to begin when the vessel sails from this port, after receiving her orders from the charterer, or when she is ready for sea if detained by the charterer; and is to end when the vessel is paid off in Europe, the charterer’s cargo being entirely discharged (the acts of God, of kings and rulers, fire, pirates, &c., excepted). The freight to be

paid in the following manner: viz. one month's pay, say 250*l.* sterling, when the vessel sails from the Falkland Islands, and the balance as may be due on true delivery of the cargo in the usual and customary way at the port of discharge," &c.

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The vessel sailed from Monte Video in the month of April, 1847, under that charter-party, and proceeded from thence to the Falkland Islands, where she arrived safe in the month of June following. While the vessel was at the Falkland Islands, R. Williams, the agent of the plaintiffs there, gave Lars Backer, the captain of the vessel, a bill of exchange, drawn by Williams upon the plaintiffs, for 250*l.* This bill was drawn by him, and received by the captain, in payment of one month's pay, agreed in and by the said charter-party to be paid when the vessel sailed from the Falkland Islands. This bill was duly honoured and paid by the plaintiffs at maturity.

When the vessel sailed from Monte Video, there was loaded on board of her a cargo, to be delivered at the Falkland Islands, under the above charter-party; which cargo was insured by the plaintiffs for 3000*l.* by a policy, dated 5th of July, 1847, and underwritten by the defendant. The said cargo was duly delivered at the Falkland Islands. The vessel, after discharging such cargo at the Falkland Islands, proceeded to Santa Cruz, on the coast of Patagonia, and there loaded 400 tons of dried guano, to be taken to Europe under the said charter-party. The vessel then returned to Monte Video, where she arrived on the 23rd of September, 1847, with the said guano so loaded at Santa Cruz as before mentioned.

On the 27th of September, 1847, the plaintiffs wrote the following letter from Monte Video to Messrs. Ricketts, Boutcher, & Co., of London:—

“Monte Video, 27th Sept., 1847.

“Gentlemen,—The ‘Napoleon’ arrived in this port on the 23rd, from Santa Cruz, viâ Falkland, with only

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about 400 tons guano, as there was no more dry stuff on the island, nor the possibility of drying on account of the season, so that the captain left the river under protest. I have been trying to obtain cargo on freight to fill up, but I have not succeeded; and rather than let her go as she is, I have determined on shipping 4000 or 5000 dry hides for my account; and, on receipt of this, you will please have insurance effected to cover same, say 2300*l.* sterling, as interest may hereafter appear, for Havre direct. I beg to remark, that, with the view of saving the duties on the guano and also on the hides, I have induced Captain Backer to change the flag, making him an extra allowance; therefore, on effecting insurance, please note that the vessel is under Monte Videan colours, and called the Napoleon, Backer master. R. Williams gave Captain Backer a draft on yourselves for 250*l.* sterling, according to charter-party, which you will please protect, insuring the amount, as well as a further sum of 200*l.* sterling, which amount I shall have to advance him, say, in all, 450*l.* sterling.—I remain, Gentlemen, your obedient servant,

“SAMUEL F. LAFONE”

In consequence of this letter, Messrs. Ricketts, Boucher, & Co., on the 6th of December, 1847, effected the policy in the declaration, “lost or not lost from Monte Video to Havre,” on 450*l.*, being freight advanced to Captain Backer.

On the 14th of October, 1847, while the vessel was at Monte Video, after her return from Santa Cruz, the plaintiffs and the captain of the vessel, Lars Backer, executed another charter-party, containing the following terms:—

“Charter-party.—Monte Video, October 14th, 1847.—This charter-party witnesseth, that it is this day mutually agreed,” &c. “that the said vessel, being tight and strong,” &c. “shall proceed with the cargo now on board of the said vessel to the port of Havre de Grace direct, or as

near thereunto as she may safely get, and deliver the same in conformity with the bills of lading, freight to be paid at the following rate: 250*l.* sterling money per month, free of all port charges, pilotages, stevadore's expenses, and commissions, including those inward at the port of discharge; the time to commence from the 26th of March last past, and to end on the day of the vessel's being discharged in the port of Havre de Grace, &c. The freight to be paid on right delivery of the cargo at the port of discharge: that is to say, such amount as may then have become due after the deduction of the 250*l.* sterling, which the captain has already received on account of this charter," &c.

When the last-mentioned charter-party was executed, the former charter-party of the 10th of February, 1847, was in full force, and had not been in any manner cancelled or annulled.

The vessel sailed from Monte Video for Havre on the 19th of October, 1847, and was totally lost with her cargo at sea on the 20th of October. The cargo of the vessel, when she left Monte Video for Havre, consisted of the guano which she had brought from Santa Cruz, and 5000 hides, weighing about seventy tons, which were laden by the plaintiffs at Monte Video for Havre. Messrs. Ricketts, Boutcher, & Co., who effected the policy, did not communicate to the underwriter (the defendant) that the vessel had been to Patagonia, nor did they communicate to the defendant the aforesaid letter of the 27th of September, 1847, which they had received from the plaintiffs as aforesaid.

The learned Judge told the jury, that, if they believed the evidence, they ought to find that the said sum of 250*l.* was a payment by the plaintiffs for freight for the carrying and conveying of goods on board the said vessel on a voyage from Monte Video to Havre, within the meaning of the policy of the 6th of December, 1847; and that the plaintiffs were entitled by law to recover from

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the defendant in respect of the loss of the said sum of 250*l.*, as freight advanced within the meaning of the policy of insurance; and the jury accordingly found a verdict for the plaintiffs.

The defendant's counsel having tendered a bill of exceptions to the above ruling, and assigned error thereon, the case was now argued (a) by

J. Wilde for the plaintiff in error.—The plaintiffs below are not entitled to recover in respect of the 250*l.* First, because under the charter-party, from the time of effecting the policy up to and at the time of the loss, the plaintiffs had not advanced freight at risk which could be the subject of insurance. Secondly, if they had any insurable interest, it is not properly described in the policy, and the effect of that misdescription has been to mislead the underwriters and render the policy void. As to the first point, the subject-matter insured is described as "freight advanced." The term "freight" may mean either the sum paid for the carriage of goods, or the sum paid for the hire of the vessel. In this case it has the latter signification. The vessel was hired at 250*l.* per month, the agreement being that the first month's instalment should be paid at the Falkland Islands; and it was accordingly paid. The cargo having been carried there and safely delivered, the vessel had earned her first month's pay. Then, how can that money so paid be said to be a sum at risk upon a subsequent voyage? The charterers had had not only the use, but the productive use, of the vessel. As regards that freight, it was immaterial whether the vessel was lost or not; for a subsequent loss would neither increase nor diminish the benefit derived from that voyage. Suppose the second had been the only charter-party, it would have amounted to a statement by the charterer that he had had

(a) Before *Coleridge, J., Maule, J., Wightman, J., Cresswell, J., Erle, J., Williams, J., and Talfourd, J.*

the vessel since March, and that the owner had received 250*l.* for the first month. The use and benefit of the vessel during the first month was in no way connected with her employment in carrying another and different cargo from Monte Video to Havre, but a totally distinct adventure, which terminated productively. The nature of the payment cannot be altered by a subsequent retrospective agreement. The 250*l.* was paid in discharge of an obligation imposed by an existing agreement, and it is not competent for the parties, as regards third persons, to treat that as a payment under the second charter-party. The object of that charter-party was in truth to enable the vessel to sail under Monte Video colours. This money was never paid in respect of freight on a voyage from Monte Video to Havre, but from Monte Video to the Falkland Islands. This is not a valued policy, there being no need of that when the insurance is on a sum of money.—Secondly, the plaintiffs' interest, if any, is misdescribed in the policy, so as to mislead the underwriter. From the statements that the insurance is on freight advanced, and that the voyage is from Monte Video to Havre, the underwriter would have a right to presume that Monte Video was the port of loading. An underwriter is enabled to form some idea of the nature of a cargo by knowing the port of loading, since he is generally aware of the description of cargo usually shipped from a particular port. It is therefore material that the true port of loading should be stated, and a concealment of that fact will vitiate the policy: *Hodgson v. Richardson (a)*, Marshall on Insurance, 330. The policy ought to have described the insurance as upon freight advanced on goods shipped at Santa Cruz, and carried from Monte Video to Havre. This is not the case of a misdescription simpliciter, but of a want of communication; and under such a policy the underwriter incurs a risk in respect of a cargo which is not the produce of

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(a) 1 W. Black. 463.

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Monte Video, and the nature of which he has no means of ascertaining.

Watson, for the defendants in error.—The plaintiffs had an insurable interest, and that is properly described in the policy. The freight was at the rate of 250*l.* a month, one entire sum for the whole voyage from Monte Video to the port of discharge. In general, freight is not payable until the voyage has terminated, but in this case 250*l.* was to be paid in advance on the vessel leaving the Falkland Islands. Nothing is said in the charter-party about a cargo to the Falkland Islands; nor was the 250*l.* paid for going there. The fallacy consists in not distinguishing between the voyage of the ship and the voyage insured: *Arnould on Insurance*, 334. Suppose a vessel, on a voyage from Alexandria to Liverpool, arrived at Cork, and the owner insured the cargo from Cork to Liverpool, that would be a good insurance, and the vessel would be in the course of earning freight on her first voyage when at Cork. So here, the *voyage of the ship* was from Santa Cruz to Europe; she was, in the course of that voyage, at Monte Video, and the policy was on the voyage from thence to Havre, which was the *voyage insured*. *Hodgson v. Richardson* (a) was not a case of misdescription, but of concealment. Here the voyage insured is properly described in the policy. Assuming that the vessel had deviated by being at Monte Video, it was competent for the parties to cancel the original charter-party and enter into a new contract. They accordingly agree that, instead of the vessel carrying guano only from Santa Cruz, she shall carry hides also from Monte Video; and as 250*l.* had been paid under the cancelled charter-party, it is agreed that that sum shall be considered as paid under the new charter-party. There is nothing illegal in such a contract. It is similar to the case of a tenant who has paid a premium for a lease, and after

(a) 1 W. Black. 463.

having occupied for a short time accepts a new lease, under an agreement with his landlord that the sum paid shall be considered as a payment under the new lease. If an action were brought on the first charter-party, the second might be pleaded in accord and satisfaction. The 250*l.* advanced could not have been recovered back: *Anonymous* (a), *De Silvale v. Kendall* (b), *Saunders v. Drew* (c).

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Secondly, the plaintiff's interest is properly described. It is not necessary that the policy should describe the voyage of the ship, but only the subject matter of the insurance, and that is correctly stated to be freight advanced to the captain: *Flint v. Flemymg* (d).

J. Wilde replied.

COLERIDGE, J.—We are all of opinion that the ruling of the Lord Chief Baron was correct, and on a very short ground. There had been a part payment for freight under the first charter-party, and Mr. *Wilde* contended that that was a payment for services at that time rendered, and that the transaction to which it related was at an end. In our opinion that is not so. The 250*l.* was not a separate sum which was to become due on the arrival of the vessel at the Falkland Islands, but only a portion of the entire sum payable at that particular place, and therefore the whole still remained at risk. That was the state of things under the original charter-party; and as no interest or rights of third persons intervened, it was competent for the parties, as between themselves, to do away with that charter-party and enter into a new one; and we are of opinion that, by the substitution of the second charter-party, they annulled the first. Then, what was to be done with this sum of money? They agreed to consider it as part of the entire sum to be paid under the new charter-party; and as

(a) 2 Show. 283.

(c) 3 B. & Ad. 445.

(b) 4 M. & Selw. 37.

(d) 1 B. & Ad. 45.

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it was a good insurable interest under the old charter-party, it remained the same. Then comes the question, whether there was a misdescription in the policy, which states the insurance to be on a voyage from Monte Video to Havre. We think that there is no misdescription in that respect. The result is, that the judgment of the Court below must be affirmed.

Judgment affirmed.

Feb. 2.

JAMES and Others v. COCHRANE and Another.

By indenture, a certain coal mine was demised to the defendants, with liberty to make

ERROR on a bill of exceptions, and also on the judgment of the Court of Exchequer for the defendants on demurrer, in the case of *James v. Cochrane* (a).

such outstrokes, drifts, and other communications, through a barrier, covenanted to be left unworked, of the demised mine and any adjoining coal mine, as should be necessary for bringing coal from such adjoining mine into the demised mine, and by such outstrokes &c, to convey under-ground, from such adjoining mine into the demised mine, and from thence to convey away, such coal, and also to draw to bank at any of the pits sunk or to be sunk in the demised lands. The defendants covenanted, that they would not do or suffer to be done anything in working the demised mine, whereby the same should be damaged, drowned, or overburthened with water or styth, or which might occasion any creep or thrust upon the workings, shafts, aircourses, or watercourses of such colliery, and would keep the levels, drifts, and necessary staples for air clear and in good repair, order, and condition from the surface of the earth down to the levels or drifts, and would draw all the water to come forth out of the colliery by engines to the surface of the earth; and also would, in working the demised mine, leave unwrought a barrier of coal of a certain breadth, and not open any communication between the demised and any adjoining mine, the coals of which should not be won by the lessees by virtue of the liberties aforesaid, or make any outstroke, drift, or watercourse into the same, except by virtue of those liberties: also that the lessees would, once a month, draw to bank at some of the pits or shafts of the demised coal mine (provided that the same should be pits or shafts from which the coals of the thereby demised colliery should not be worked by an outstroke) and lay in some convenient place upon the lands of the lessors all the manure, compost, and dung to be made and bred by the horses employed in working the demised mine, and would spend and bestow so much thereof as might be necessary for that purpose, in dressing and manuring any lands which the lessees might occupy as tenants to the lessors. The lease contained various clauses which spoke of pits or shafts to be sunk on the demised lands, but there was no express covenant to make any such pit or shaft:—

Held, in the Exchequer Chamber, on a bill of exceptions to the ruling of the Judge at Nisi Prius, that the liberty authorised the lessees to break through the barrier for winning coal, as well of the demised mine as of the adjoining mines in their occupation, though the coal of such demised or adjoining mines, when won, was not to be nor was brought to the surface through a pit or shaft in the land of the lessors above the demised mine, and although no such pit or shaft in fact existed.

Held, also, in the Exchequer Chamber, affirming the judgment of the Court of Exchequer, that no covenant could be implied binding the lessees, upon the demised mine being worked and manure bred therein, to sink a pit or shaft on the demised land.

Seemle, that the suffering a seam of the mine, where workings had been formerly carried on but were discontinued, to be filled with water, whereby the aircourses in that seam were interrupted, was not a breach of the covenant to keep the levels, drifts, and necessary staples for air in good repair, order, and condition.

(a) 7 Exch. 171.

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The action was by the plaintiffs, as reversioners, for the breach of covenants in a lease to the defendants, dated the 5th of October, 1824, of certain coal mines, situate under an estate called Eppleton, in the parish of Houghton le-Spring, in the county of Durham. The declaration set out the lease, which demised the coal mines, with liberty and power for the lessees to make pits, trenches, groves, and staples, and to drive drifts, and make watergates and watercourses, as well for the winning, working, and getting coals, as for the avoiding and carrying off foul air and styth, or carrying air into, through, and out of the same—
“ And also full power, liberty, and authority to and for the lessees, their executors &c., from time to time and at all times during the continuance of the demise, to make, drive, and use such outstroke or outstrokes, drift or drifts, or other communications, not exceeding the breadth of four yards each, within and through the barrier, bulk, or warren of coal, thereby covenanted as hereinafter mentioned to be left unworked, of the said colliery and coal mines thereby demised, lying contiguous or adjoining to any other colliery or coal mines, which they then were or should, at any time thereafter, during the continuance of the said demise, become possessed of or entitled to, or in which they or any of them then had or should have any share or interest, as should be thought necessary or convenient by them the lessees, their executors &c., for the effectual winning of such adjoining colliery or coal mines, and for the purpose of bringing, leading, and conveying under-ground the coals which at any time, during the continuance of the demise, should be wrought or gotten by them within or out of such adjoining colliery and coal mines, and which should be thought fit or convenient to be brought, lead, and conveyed under-ground from such adjoining colliery and coal mines, unto and into the colliery and coal mines thereby demised, or the shafts or workings thereof, and by such outstroke or outstrokes,

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drift or drifts, or other communications, to bring, lead, and convey under-ground from such adjoining colliery and coal mines unto the colliery or coal mines thereby demised, or the shafts or workings thereof, and from thence to convey and carry away, all such coals as should by them be wrought or gotten within or out of such adjoining colliery or coal mines; and also to draw to bank, at any of the pit or pits sunk or to be sunk by them in any of the lands and grounds aforesaid, the coals from and out of such adjoining colliery and coal mines, in such manner and by such ways and means as they, the lessees, their executors &c., should think fit, and to do whatsoever should be requisite and necessary for the purposes aforesaid, and for the maintaining, keeping, opening, and preserving of all such outstroke and outstrokes, drift and drifts:" Habendum for the term of forty-two years from the 11th of November, 1824, yielding and paying yearly, for the first two years of the term, the rent of 20s. for every ton of merchantable coals of the High Main and Hutton seams; and 17s. 6d. a ton for every ton of every other seam (except coals used for the engines, &c.) which should be gotten during the first two years of the term, not exceeding 1000 tons yearly; and 22s. and 17s. 6d. a ton (as before) for every ton exceeding that quantity; and also paying yearly, during the remainder of the term, the rent of 1000*l.* for such a number of tons of merchantable coal to be gotten out of the demised collieries, as at the rate of 20s. and 17s. 6d. a ton would amount to 1000*l.*, whether such number of tons should be yearly gotten or not; and also paying yearly, during the remainder of the term, above the certain yearly rent of 1000*l.*, the further rent of 22s. and 17s. 6d. a ton respectively (except as before mentioned), above the number of tons for which the yearly rent of 1000*l.* was reserved; and also paying the further clear rent of 7s. 6d. per ton of coals, which by the lessees should, during the term, be gotten or carried away

from, forth, and out of any collieries or coal mines adjoining or near to the colliery and coal mines thereby demised, by virtue or means of all or any of the liberties, powers, and privileges by the indenture granted, and which should be drawn to bank in any of the said lands and grounds of the lessors; the rent or sum of 7s. 6d. per ton to include outstroke rent, shaft rent, and wayleave rent; but in case the coals to be gotten out of such adjoining collieries should be gotten by means of pits in such adjoining collieries, and the water should be conveyed therefrom through the demised collieries, paying to the lessors yearly 2s. 6d. per ton for a watercourse rent: also, paying to the lessors for ground occupied, damaged, or used for pit-room, working of quarries, &c., or in exercising or enjoying all or any of the liberties, powers, &c. by the indenture granted, the rent of 40s. per acre: Provided, that if any of the rents should be in arrear for forty days after demand, it should be lawful for the lessees to distrain all coals "found at or in any of the pit or pits of the colliery and coal mines thereby demised," or in any other part of the demised premises, &c.—Covenant by the lessees that they would pay the rents, and also compensation for damage done to the estate in exercising or enjoying the liberties, powers, &c. granted; and that the lessees should not nor would "do or commit, or wittingly or willingly suffer to be done or committed, any act, matter, or thing in the working and carrying on the said coal mines, seam and seams of coal thereby demised, whereby the same or any part thereof should or might be damnified, drowned, or overburdened with water or styth, or which might occasion or bring any creep or thrust upon the workings, shafts, aircourses, or watercourses of such colliery or coal mines; and should and would keep the levels and drifts and the necessary staples for air clear and in good repair, order, and condition, from the surface of the earth down to the levels or drifts, and should and would raise and

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draw all the water to come forth and out of the colliery by means of fire or other engines or gins, to the surface of the earth," &c.; "and also should and would, in the working of the colliery and coal mines thereby demised, leave unwrought a barrier or warren of whole coals, of forty yards in breadth or thickness, in all and every part or parts next to and adjoining each and every other colliery and coal mine not belonging to the lessors, &c., and should not work or take away the barriers, bulks, or warrens of coal, or open a communication between the colliery and coal mines thereby demised and any contiguous and adjoining colliery, the coals of which should not be won or wrought by the lessees, their executors &c., by virtue of the liberties and powers aforesaid, or make or suffer any outstroke, drift, or watercourse into or through the same, except by virtue of those liberties and powers," &c.: And also that the lessees "should not nor would permit any person to lead coals from or to any other colliery whatsoever along the waggon way or other ways which should be made through the lands of the lessors, save and except such coals as should be gotten by the lessees from any adjoining collieries, and should be brought to bank on the lands of the lessors, and be led along the same ways in pursuance of the powers and authorities for that purpose by the indenture granted as aforesaid:" And also, that the lessees "should and would keep distinct and correct accounts of all coals won or gotten from or out of the demised colliery, seam or seams of coal, and brought to bank either at any pit or pits in the said lands of the lessors, or at any other pit or pits;" and also separate accounts of all coals gotten from any adjoining colliery, and brought to bank on the lands of the lessors: also that the lessors should and might, at their own costs, "employ any person or persons as a writer or writers, clerk or clerks, at all or any of the pits of the colliery and coal mines thereby demised," and at any of the pits of any such ad-

joining colliery, to take an account of the number of tons wrought from the demised colliery or such adjoining colliery: and that it should be lawful for the lessees, their viewers, &c., "when any of the pit or pits of the collieries and coal mines thereby demised, or the pit or pits of any adjoining or neighbouring colliery or coal mine of the lessees" should be at work, to descend and go down and into, and ascend and come up again "out of and from all or any of the pit or pits, shaft or shafts, and other workings of or belonging to the colliery or coal mines thereby demised," or the adjoining collieries, &c.—"And also that the lessees, their executors, &c., or their servants or workmen, should and would, once in every month, or oftener, during the said term, at their own expense, draw to bank at some of the pits or shafts of the collieries or coal mines thereby demised, (provided that the same should be pits or shafts from which the coals of the thereby demised colliery should not be worked by an outstroke), and lay in some convenient place in that behalf upon the said lands and premises of the lessors, for the lessors, their heirs, or assigns, all the manure, compost, and dung, to be made and bred by the horses employed under-ground in working the demised collieries; and should spend and bestow so much thereof, and of all such dung, manure, compost, &c., as should be made, bred, or arise in, under, or upon the estate, lands, and premises of the lessors, or any part thereof, as might be necessary for that purpose, in dressing and manuring any lands or grounds which the lessees, their executors &c., might during the term thereby granted occupy as tenants to the lessors, or either of them, &c.; and that if they should occupy no land for which manure should be necessary, or that there should be a surplus of such manure, dung, compost, &c., over and above what should be necessarily applied in the manuring of such land as aforesaid, that then, and in any such case, the lessors should have, and by the lessees be suffered and permitted to take and carry away,

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the whole of such manure, dung, compost, &c., or such surplus thereof, as the case might happen to be, and to dispose of the same as they should think proper." And also, that the lessees would, at all times, "cover up, timber over, or fence round the pits or shafts to be sunk in any of the said lands of the lessors, as soon as they should desist from working at the same," &c.: "And also, that the lessees, at the expiration or other sooner determination of the said demise, should and would yield and deliver up to the lessors, &c., the peaceable and quiet possession of the colliery and coal mines thereby demised, and of the engine, pit or pits, and all such pits or shafts out of which coals should have been drawn at any time within the space of three years next preceding such expiration," &c. And the lessors did thereby covenant "that it should and might be lawful to and for the lessees to work all or any and such and so many of the seam and seams of coal thereby demised as they should think proper," &c.: "And also, that it should and might be lawful to and for the lessees, their executors, &c., from time to time and at all times during the continuance of the demise, by such outstroke or outstrokes, drift or drifts, as might be so made as aforesaid, to bring, lead, and carry under-ground, from the colliery and coal mines thereby demised, unto any adjoining collieries and coal mines which the lessees then were or should at any time thereafter, during the continuance of the demise, become possessed of or entitled to, or in which they or any of them then had or should have any share or interest, or to the shafts or workings thereof, all such coals and cinders as should by them be wrought or gotten within or out of the colliery and coal mines thereby demised, without paying to the lessors, &c., any outstroke rent for the same; such rent, if any, being payable to the owner or owners of such adjoining colliery or collieries," &c. The declaration then set out a lease of the 11th of March, 1825, by which the previous lease was altered in some respects

immaterial to this question; and, after averring that the reversion vested in the plaintiffs, and that the defendants worked the mines, assigned (amongst others) the following breaches:—Fourthly, that “the lessees did not nor would keep the levels and drifts and necessary staples for air of the demised colliery and coal mines clear and in good repair, order, and condition, from the surface of the earth down to the levels or drifts; but, on the contrary thereof, after the making of the several indentures, &c., and after the plaintiffs had become and whilst they were so seised as aforesaid, the lessees suffered and permitted the levels and drifts and necessary staples for air to be, and the same then became and were, and thence hitherto have been and still are, stopped up and in bad repair, order, and condition, from the surface of the earth down to such levels and drifts.”—Fifth breach: That the lessees did not nor would, after the making of the indentures, &c., raise and draw all the water which had, during the period last aforesaid, come forth and out of the demised colliery, by means of fire or other engines or gins, or otherwise howsoever, to the surface of the earth, or to any offtake, drift or drifts, and there discharge and carry off the same; but, on the contrary thereof, permitted and suffered divers large quantities of water, which, after the plaintiffs had become so seised as aforesaid, came from, forth, and out of the said demised colliery and coal mines, to be and remain and from thence hitherto have continued therein, without being raised, drawn, discharged, or carried off, in the manner in that behalf provided.—Sixth breach: That, although the defendants, after the making of the indentures, &c., worked the demised colliery and coal mines and divers seams thereof, and although divers parts of the demised colliery, &c., so worked, were next to and adjoining divers other collieries and coal mines not belonging to the lessors, to wit, a certain colliery and coal mine called

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Hutton Mine, &c., yet the defendants did not, in so working the demised colliery and coal mines and the seams thereof, leave unwrought in each and every of the seams so worked a barrier or warren of whole coals of the breadth or thickness in the first-mentioned indenture provided, in all and every part or parts next to and adjoining each and every of the said other collieries and coal mines not belonging to the lessors, according to the covenant in that behalf, but, on the contrary thereof, the barriers or warrens of coal so agreed to be left unwrought as aforesaid, and next to and adjoining the said other collieries and coal mines, so not belonging to the lessors, were, at and during all the times last aforesaid, wrought and hollowed out, abstracted, and carried away by the defendants, in so as aforesaid working the demised collieries and coal mines, for winnings and purposes other than and different from all and every other of the winnings and purposes in that behalf authorised by the said indentures or either of them, and without and contrary to the power, liberty, and authority to the lessees in that behalf granted by the said indentures or either of them, contrary to the covenant of the lessees (a).

(a) The seventh, eighth, ninth, and tenth breaches raised substantially the same question as the sixth. The seventh breach alleged that the defendants worked and took away divers pieces or portions of the barriers, bulks, or warrens of coal, so agreed to be left, for other purposes than authorised by the indentures. The eighth breach alleged that the defendants opened, and kept and continued open from thenceforth, divers communications between the demised colliery and coal mines and certain other

collieries adjoining. The ninth breach alleged that the defendants made divers outstrokes, drifts, and watercourses into and through the said barriers. The tenth breach alleged that the defendants permitted and used, for winnings and purposes other than and different from the winnings and purposes in that behalf authorised by the said indentures, divers outstrokes, drifts, watercourses, and communications.—The pleas to these breaches respectively traversed the allegations therein.

Eleventh breach, that certain manure, compost, and dung was made and bred under the said estate, lands, and premises of the lessors, in the demised colliery and coal mines, by horses employed by the defendants underground in working the demised collieries. That the said manure, compost, and dung could not, nor could any part thereof, be drawn to bank and laid upon the lands and premises of the lessors, otherwise than by and by means of some pit or pits or shafts. That there was not, at the time of the said demise, any pit or shaft of the said collieries or coal mines, from which the coals of the demised colliery were not worked by an outstroke or outstrokes; and although, after the said manure &c., had been so made and bred, a sufficient time had elapsed for the defendants to have made a pit or shaft on the demised collieries, &c., yet the defendants did not nor would at any time make, nor was nor were there at any time, a pit or pits, shaft or shafts of the demised collieries or coal mines, from which the coals or coal mines were not worked by an outstroke or outstrokes, and, by reason of the premises, the manure &c. so made could not be and was not at any time drawn to bank &c.

The defendants pleaded (*inter alia*) to the fourth breach—That the defendants did keep the levels and drifts, and the necessary staples for air, of the demised colliery and coal mines clear and in good repair, order, and condition, from the surface of the earth down to the levels or drifts, according to the defendants' covenant; and they did not suffer or permit the said levels, drifts, and necessary staples for air, &c., to be nor were the same stopped up or in bad repair, order, or condition, *modo et formâ*: concluding to the country.

To the fifth breach—That the defendants did not suffer or permit the said quantities of water to be or remain, nor did the same remain or continue, in the colliery without

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being drawn off in the manner in the first indenture provided, modo et formâ: concluding to the country.

To the sixth breach—That the barriers or warrens of coal so agreed to be left unwrought, as in the first indenture and sixth breach mentioned, and next to and adjoining the said other collieries and coal mines in the sixth breach mentioned, were not, at any of the times in that breach mentioned, wrought, hollowed out, abstracted, or carried away by the defendants in working the demised colliery and coal mines, for winnings and purposes other than or different from the winnings and purposes in that behalf authorised by the said indentures or either of them, or without or contrary to the power, liberty, and authority to the lessees in that behalf granted by the said indentures or either of them, or contrary to the covenant of the lessees in the first indenture in that behalf contained, modo et formâ: concluding to the country.

To the eleventh breach—General demurrer, and joinder therein.

Issues having been joined on the above pleas, the cause was tried before *Cresswell*, J., at the Durham Spring Assizes, 1852, when the following facts appeared:—The estate of the lessors in the demised premises vested in the plaintiffs on the 14th of August, 1848. The defendants were tenants, not only of the Eppleton coal mine, the mine demised, but of several other collieries adjoining the Eppleton mine, none of which belonged to the lessors or the plaintiffs. At the time of granting the lease there was no communication or opening of any kind between the Eppleton mine and the adjoining mines. There were several seams of coal in the Eppleton mine and the adjoining mines, lying one above the other, the lowest of which was called the Hutton seam. None of the coal in the Eppleton mine had been worked before the execution of the lease. The Hutton seam had been partially worked by the defendants,

and was in the course of being worked when this action was commenced. Another of the seams, called the High Main seam, had, at one time during the term, been partially worked to a small extent by the defendants, but not for many years before the plaintiffs' title accrued, and great quantities of coal still remained unwon in the Hutton and High Main seams. No workings had taken place in any other of the seams. There never had been any pit or shaft in the Eppleton mine or the surface of the land above the same, or any means of getting coal or other substances from that mine to the surface of the earth, except by some of the pits or shafts in some of the adjoining mines. Part of the coal won by the defendants from the Hutton seam had been brought to the surface of the earth chiefly by the Jane pit, being a pit or shaft in a mine called the Downs, being one of the adjoining mines in the occupation of the defendants, and the remainder of the coals so won by the defendants had been brought to the surface of the earth by the Union pit, being a pit or shaft in another adjoining mine in the occupation of the defendants, and there never was any communication between the Hutton seam of the Eppleton mine and the surface of the earth, other than by the Jane pit and Union pit. The defendants had made several openings and communications between the Hutton seam in the Eppleton colliery and the other adjoining mines in the occupation of the defendants, and also between the High Main seam in the Eppleton mine and the said other mines, being passages, openings, or drifts. The coal gotten in the High Main seam of the Eppleton mine was all brought to the surface of the earth by pits in the Hutton mine, in the occupation of the defendants. Between the time of the accruing of the plaintiffs' title and the commencement of the action, the coals won by the defendants in the Hutton seam of the Eppleton mine were from time to time brought by the defendants, by means of the said passages, openings, and drifts,

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from the Hutton seam of the Eppleton mine into the adjoining mine called the Downs, and then brought by the Jane pit to the surface of the earth; and also coals won by the defendants in some of the other mines in their occupation adjoining the Eppleton mine were brought by the defendants, by means of the said passages, openings, or drifts, from such adjoining mines into the Eppleton mine, and through the Eppleton mine and out of the same into the mine called the Downs, and thence by the Jane pit brought to the surface of the earth. The coals which, but for such passages, openings, or drifts, would have formed barriers of whole coal of forty yards in breadth or thickness in parts of the Eppleton mine adjoining the other mines respectively, were (in the places where such passages, openings, or drifts were made) removed and taken away. Prior to and at the commencement of the action, part of the High Main seam of the Eppleton mine, where workings had formerly been carried on, was filled with water, and thereby the aircourses in the workings in that seam were interrupted with water, but that had no effect upon the aircourses or workings in the Hutton seam.

The plaintiffs' counsel contended, that the liberties to break through the barrier covenanted to be left did not extend to authorise the lessees to break through such barrier for winning coal of the demised mine, or for winning coal of adjoining mines, if the coal of such demised or adjoining mines, when won, was not to be and was not brought to the surface through a pit or shaft in the land above the demised mine, or if no such pit or shaft existed; and also, that the facts proved with reference to the water in the High Main seam entitled the plaintiffs to a verdict on the issue raised on the fourth breach.

The learned Judge delivered his opinion to the jury, that the liberties to break through the barrier covenanted to be left extended to authorise the lessees to break through such barrier for winning coal of the demised mine, and for

winning coal of the adjoining mines in the occupation of the defendants, though the coal of such demised or adjoining mines, when won, was not to be nor was brought to the surface through a pit or shaft in the land of the lessors above the demised mine, and although no such pit or shaft in fact existed; and also that the facts proved with reference to the water in the High Main seam did not entitle the plaintiffs to a verdict on the issue raised on the fourth breach.

The plaintiffs' counsel having tendered a bill of exceptions to the above ruling, and assigned error thereon, and also on the judgment for the defendants on the demurrer to the last breach, the case was argued (a) (Feb. 1, 2), by

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Atherton (*Aspland* with him) for the plaintiffs.—First, the learned Judge misdirected the jury with reference to the issues raised on the sixth, seventh, eighth, ninth, and tenth breaches. That question depends on the construction of the covenant to leave unwrought a barrier of coal between the demised mines and adjoining mines. Reading the covenant in connection with the liberties previously granted to make outstrokes through the barrier, it is submitted that the breaches in the barrier were not made in conformity with the liberties. No shaft was sunk on the demised mine, but the coal there won was carried through the drifts into the adjoining mine, and from thence brought to the surface by a shaft in that mine; and in some instances the coal of an adjoining was carried through a drift into the demised mine, and passed from thence through another drift into an adjoining mine on the other side, and so raised to the surface by a shaft in that mine. Those were not only the uses to which the drifts were applied, but the very purposes for which they were made. Such a user was a clear violation of the liberties. There is an absolute co-

(a) Before Coleridge, J., Wightman, J., Creswell, J., Erle, J., Williams, J., and Crompton, J.

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venant to leave unwrought a barrier next to adjoining mines, and to open no communication with mines the coals of which were not wrought under the liberties, nor to make any outstroke except by virtue of the liberties. The description of the liberties consists of two parts: the first is a statement of the circumstances under which, and the purposes for which, outstrokes may be made; the second defines the uses to which those communications, when made, may be applied. The lessees are to be at liberty to make such outstrokes as may be thought necessary for the effectual winning of the adjoining mine, and for the purpose of conveying coal from such adjoining mine into the demised mine; and by such outstrokes to convey the coal of such adjoining mine into the demised mine, and also to draw to bank at pits in the demised land. Therefore the communication is to be made with reference to the adjoining mine, not the demised mine, and the coal won in such adjoining mine is to be brought from thence into the demised mine, and was clearly intended to reach the surface in some way. But it could only come to bank either by means of a shaft in the demised mine, or by being taken back to the adjoining mine, which is absurd, or by being conveyed from the demised mine through another barrier into another adjoining mine. The lessees are not warranted in bringing coal from an adjoining mine into the demised mine, without reference to the manner in which it is to be brought to bank. They cannot break through the barrier of an adjoining mine, except for the purpose of winning coal in such mine, and of bringing the coal into the demised mine so as to reach the surface by a shaft in that mine. The liberty does not authorise the use of the demised mine as a place of transit for the coal won in the adjoining mines on either side. The words "unto and into the colliery thereby demised," indicate the purpose of the communication, and must be read in conjunction with the

words "and also to draw to bank at the pits to be sunk on the lands." [*Coleridge, J.*—That construction would give no effect to the words "and from thence to carry and convey away." The words "and also to draw to bank," &c., seem to confer an additional power.] The various provisions of the deed, taken altogether, shew that the parties contemplated the sinking of a pit in the demised mine. There is an express power to make a pit, a power to get coal from an adjoining mine and draw it to bank at any pit on the demised mine, a power to draw to bank in the same way coal distrained, a covenant by the lessees at the end of the term to stop up the drifts, and a power for them to carry away coal which at that time should be at the pit's mouth. The only purpose for which a communication could be made, in the first instance, between the demised and an adjoining mine, was the winning of such adjoining mine; but that could not be done without a communication between the surface and the demised mine. If the coal of the demised mine was intact, there must, in order to win it, be either a vertical or a lateral communication; but there is no power to make a lateral communication except for the purpose of winning the coal of the adjoining mine. Unless that construction is right, the user found would be permissive; for although various rents are expressly reserved, there is no rent in respect of the use of the mine as a thoroughfare. The difference between the amount of rent for the first two years and for the remainder of the term, shews that the parties contemplated that the lessees would be occupied during the former period in constructing a shaft. Again, a rent is reserved for coal gotten from any adjoining mine, and drawn to bank through the demised mine. The parties were not forgetful of outstroke or way-leave rent; and if it had been intended that coal won in the demised mine should arrive at the surface by an adjoining mine, a rent would have been reserved in respect of it. But, independently of the other provisions

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in the lease, the word "outstroke" in the liberty speaks for itself, and the terms "drift or other communications" must be governed by it. There could be no "outstroke" unless the lessees first found their way into the demised mine, and then broke out from it through the barrier into the adjoining mine. Here the first communication with the demised mine must have been by an "instroke."

Secondly, the learned Judge misdirected the jury with reference to the issue raised on the fourth breach. That breach is founded on the covenant to keep the levels and drifts and necessary staples for air clear and in good repair. The evidence was, that part of the High Main seam was filled with water, whereby the aircourses were interrupted; consequently on that issue the plaintiffs were entitled to a verdict.

Thirdly, the plaintiffs are entitled to judgment on the demurrer to the last breach. The covenant on which that breach is founded was intended for the lessors' benefit. If the defendants thought proper to work the mine with horses, they were bound at their own cost to bring the manure by a pit to the surface, and expend it on the lessors' land. [*Coleridge, J.*—Then how do you construe the proviso?] It is mere surplusage: if there is a pit in the demised mine, the coal of that mine cannot be worked by an outstroke. Such a mode of working is only applicable where the coal of the demised mine is wrought by means of an adjoining mine. The words "pits or shafts of" the demised mine, means a pit or shaft in that mine. The construction contended for is supported by the language of the covenants enabling the lessors to employ clerks at the pits of the demised mine, and to descend such pits. The consideration of detriment or loss to the lessees cannot affect the construction of the covenant. The plaintiffs' view is aided by the other provisions in the lease, and it is no reason why they should be deprived of the manure because there is no pit on the demised land by which to convey it.

Manisty, for the defendants, was requested by the Court to confine his argument to the direction on the fourth breach.—That breach was not supported by the evidence that part of the High Main seam, where workings had been formerly carried on, but had ceased long prior to the plaintiffs' title, was filled with water, whereby the aircourses were interrupted in that seam. The covenant to keep in repair the levels and drifts, and necessary staples for air, is a different covenant from that not to allow the shafts, aircourses, and watercourses to be stopped up by creep or thrust; and there is a further covenant, to pump all the water out of the mines. The meaning of the covenant on which the fourth breach is assigned is, that the levels and drifts and necessary staples for air should not be permanently stopped up. An interruption of the aircourses by water is no breach of that covenant. Moreover, there were no necessary staples for air which were stopped up; for the High Main seam was not worked, and it is found that the Hutton seam was not affected.

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Atherton replied as to the last point.

The judgment of the Court was now delivered by

COLERIDGE, J.—The first question in this case arose on the direction of the learned Judge upon the issues raised on the sixth, seventh, eighth, ninth, and tenth breaches in the declaration; and the propriety of his direction depends on the proper construction of a clause in the lease, by which the lessees were empowered to break through a barrier of coal, which, by a covenant in the same lease, they were bound to preserve unbroken between the demised and the adjoining mines. The learned Judge had ruled that this clause authorised the lessees to break through such barrier for winning coal as well of the demised mine as of the adjoining mines in their occupation, though the coal

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of such demised or adjoining mines when won was not to be, nor was, brought to the surface through a pit or shaft in the land of the plaintiffs above the demised mine, and although no such pit or shaft in fact existed; and we think he was right in the whole of this direction.

The question divides itself into two parts,—might a breach be made through the barrier for the purpose of introducing coal won from an adjoining mine into the demised mine, to be carried through it, and passed through another breach to be made into another adjoining mine, and so be lifted to the surface; and might it be made through the barrier for the purpose of conveying coal won in the demised mine into an adjoining mine, thence to be lifted up to the surface through the pit in that mine? As to the first of these, the affirmative seems to us clearly to follow from the language of the liberty. [His Lordship read it (a).] These words provide for three things to be done: first, the introducing the coals into the demised mine by a breach made for the purpose; secondly, they give a power of conveying them away, including, we think, in its general language the power to pass them into another mine; thirdly, and distinctly, the power of raising them to the surface through a pit sunk or to be sunk in the demised lands. Unless we give this extended meaning to this part of the lease, we shall leave an important part of the sentence without any meaning at all. As to the second of these, it is true that this part of the lease does not in terms confer the power; but if the coals of adjoining mines might be brought through the demised mines without being raised to the surface from any pit sunk in them, but might be raised from pits in adjoining mines, it is difficult to see why the coals of the demised mine itself might not also be so raised; and it is clear, from more than one provision in the lease, that that was really contemplated: thus, in the covenant

(a) Ante, p. 557.

regarding manure, on which the last breach is assigned, the manure is to be brought up at some of the pits or shafts of the said collieries or coal mines demised, "*provided that the same should be pits or shafts from which the coals of the demised colliery should not be worked by an outstroke,*" leaving a clear inference that it was intended that coals from that mine might be worked by an outstroke, that is, brought to bank by being carried into and raised up through a pit in some adjoining mine. And in the lessors' covenants, the provision is express that this may be done, and without paying any outstroke rent. [His Lordship read the covenant (a).] When, therefore, we find the language clear, that through breaches made in the barrier the coals of the demised mine might be carried, the just conclusion is, that the breaches might be made for that purpose.

The remaining exception was to the ruling on the issue raised on the fourth breach. [His Lordship read that breach (b).] The evidence applicable to this was, that there were, among others, two seams of coals in the mines—the High Main and the Hutton—the latter the lower and the most valuable. That the High Main seam had been at one time, early in the term, partially worked by the defendants, but not for many years before nor since the 14th of August, 1848, when the title of the plaintiffs commenced; and that great quantities of coal remained in it unwon: and that long before August, 1848, and continuously down to the commencement of the action, the part of the High Main seam in which the workings had been, was filled with water, and thereby the aircourses in that part were interrupted; but that had no effect upon the aircourses or workings in the Hutton seam, which alone had been worked from the time of the commencement of the plaintiffs' title, and for some years previously. The Judge directed the jury on this evidence,

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(a) Ante, p. 562.

(b) Ante, p. 563.

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that it did not entitle the plaintiffs to a verdict. And we think he was correct in this direction; for, in order to construe the language of the fourth breach, it is necessary to look also to that of the fifth. It will be observed, that the former speaks of "good repair, order, and condition, from the surface of the earth down to the levels or drifts;" and alleges that the "defendants had suffered the levels and drifts, and necessary staples for air, to be stopped up, and in bad repair, order, and condition, from the surface of the earth down to such levels and drifts." But the fifth breach points specifically to water, and complains that the defendants had "suffered large quantities of water to remain without being drawn off;" but then this is confined to water which had come forth from and out of the colliery *after the plaintiffs had become seised*. [His Lordship read the fifth breach (a).] This breach, therefore, is not sustained by the evidence, which shews the accumulation of water complained of to have existed long before August, 1848. The language of this breach, however, we think, is material to shew what is meant by that of the preceding; and that it was not directed to a mere stopping up of the aircourses by water, but to general bad repair of the levels, drifts, and necessary staples for air; and, though in the absence of any such explanation, the words might be large enough to admit of the meaning put on them by the plaintiffs, yet they will not when looked at in conjunction with a specific breach for stoppage by water immediately following.

We need not, however, make that the foundation of our judgment, because, from the statement on this record, we are of opinion that the plaintiffs' counsel contended at the trial, that, if the facts set out in the bill of exceptions were believed by the jury, their deliberative functions were at an end, and that they had nothing to do but find a verdict for the plaintiffs, and that what was said by the learned Judge was in answer to that proposition. He did

(a) Ante, p. 563.

not say that there was no evidence to go to the jury, but only that it was not a necessary conclusion from the evidence that they must find for the plaintiffs. And we think he was right. It was for the jury to consider the evidence with reference to the meaning of the covenant, breach, and plea, and more especially with reference to the nature and extent of the workings. On that point, the evidence leaves the matter in great uncertainty. The workings might have been such that the evidence as to the water, if believed by the jury, would have been conclusive to support the breach; but, on the other hand, they might have been so trifling and unimportant, that even if all the facts were literally true, there was no breach whatever. That, therefore, was material for the jury to consider, and if there was anything for them to consider, the ruling of the learned Judge was correct.

The remaining question is on the demurrer to the last breach; and here we think the judgment of the Court below ought to be affirmed. It is admitted, that, in the covenant on which this breach is founded, there is nothing which expressly binds the lessees to sink a pit on the demised premises; nor can we collect from the language any thing which binds them by implication. We agree in the reasoning to be found in the judgments of the members of the Court below; hardly, perhaps, going so far as to say, that the sinking of a pit was anticipated when the lease was framed. We should think it more correct to say, that it was considered a possible, perhaps a not unlikely event; and that provisions were made to meet that event in case it should come to pass. The judgment, therefore, of the Court below must be affirmed.

Judgment affirmed.

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OLDFIELD v. DODD and Another.

Where a trader, who, upon summons to the Court of Bankruptcy, appears and signs an admission for part only of the demand of the creditor, and also makes a deposition, that he believes he has a good defence upon the merits to the residue of the demand, and does not pay the sum so admitted, a petition for adjudication of bankruptcy being filed against him within two months, &c., he does not commit an act of bankruptcy within the meaning of the 82nd section of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106.

ERROR on a bill of exceptions.

This was an action of trespass, which was brought by the plaintiff in error against the defendants, for breaking and entering his house, and taking his goods. The defendants pleaded not guilty "by statute," and also pleading denying that the plaintiff was the owner of the house or goods.

At the trial, before *Martin*, B., at the London Sittings after last Michaelmas Term, the main question in the cause was, whether, under the following circumstances, the plaintiff had committed an act of bankruptcy. It appeared that the plaintiff, who was a trader and subject to the bankrupt laws, being indebted to the defendant Dodd in a sum not exceeding 50*l.*, had been served with an account of the debt pursuant to the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, together with a notice requiring immediate payment of the sum of 122*l.* 3*s.* The defendant Dodd filed an affidavit verifying this demand, and the plaintiff was served with a summons out of the Court of Bankruptcy, requiring him to appear before the Court to ascertain "whether or not he admitted the said demand of the defendant Moses Dodd, who claimed of him the sum of 122*l.* 3*s.* for a debt as aforesaid, or any and what part thereof, or whether he verily believed that he had a good defence upon the merits to the said demand, or to any and what part thereof." The plaintiff duly appeared in the Court of Bankruptcy before a Commissioner of Bankrupts, and made a deposition in writing (which was afterwards filed in the said Court,) in the form contained in the Schedule (J) to the Act, that he verily believed he had a good defence upon the merits to 10*l.*, part of the said demand of the defendant Moses Dodd. The plaintiff also at the

same time signed and filed in the Court of Bankruptcy an admission, whereby he confessed that he was "indebted to the said Moses Dodd in part of the said sum of 122*l*. 3*s*., that is to say, in the sum of 112*l*. 3*s*." The Commissioner dispensed with the plaintiff's entering into a bond under the statute. The plaintiff never paid, tendered, or offered to pay to Dodd the amount of the sum so admitted, nor did he secure or compound for the same to Dodd's satisfaction. The plaintiff was afterwards, on the petition of Dodd, adjudged a bankrupt, and Dodd and the other defendant were appointed the plaintiff's assignees, and the alleged trespasses were committed by the defendants in taking possession of the property of the plaintiff for the benefit of the creditors.

It was contended, on the part of the defendants, that the plaintiff committed an act of bankruptcy on the eighth day after the filing of the admission. The learned Judge ruled that the plaintiff had committed an act of bankruptcy, and he directed the jury to find a verdict for the defendants, which they accordingly did. To this ruling the plaintiff's counsel tendered a bill of exceptions, and error was assigned thereon.

Pearson, for the plaintiff in error.—The plaintiff did not commit an act of bankruptcy. The defendants will have to contend that the case falls within the 82nd section of the Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106). By the 6 Geo. 4, c. 16, s. 5, a trader committed an act of bankruptcy by lying in prison for twenty-one days, or by escaping from prison. The 1 & 2 Vict. c. 110, by which arrest for debt on mesne process was abolished, by section 8, substituted other means of making a debtor bankrupt. Then followed the 5 & 6 Vict. c. 122. The 78th section of the 12 & 13 Vict. c. 106, appears to have been copied from the 11th section of the preceding Act. The 80th section of the latter Act applies to the case where the trader

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does not attend the summons, or where he refuses to admit the demand, and does not pay or compound within a certain time. The plaintiff does not come within that section, inasmuch as he made no default in appearing. The 81st section has reference to the case where the trader signs and files an admission of the *whole* of his creditor's demand. Then the question is, whether the plaintiff comes within the predicament provided for by the 82nd section, which enacts that, "if any such trader so summoned as aforesaid shall, upon his appearance, sign an admission for part only of such demand in the form aforesaid, *and shall not make a deposition* in the form aforesaid, that he believes he has a good defence upon the merits to the residue of such demand, and (if required by the Court so to do) enter into such bond as aforesaid, to pay such sum or sums as shall be recovered, together with such costs as shall be given in any such action as aforesaid for the recovery of such residue, then and in such case, if such trader, as to the sum so admitted, shall not, within seven days next after the filing of such admission, pay or tender and offer to pay to such creditor the sum so admitted, or secure or compound for the same to the satisfaction of the creditor, and as to the residue of such demand shall not, within seven days after personal service of such summons, or within such enlarged time as may be granted to him in that behalf, pay, secure, or compound for the same to the satisfaction of such creditor, or enter into a bond in such sum, and with two sufficient sureties, as the Court shall approve of, to pay such sum as shall be recovered in any action which shall have been brought, or shall thereafter be brought, for the recovery of the same, together with such costs as shall be given in such action, every such trader shall be deemed to have committed an act of bankruptcy on the eighth day after service of such summons, provided a petition for adjudication of bankruptcy shall be filed against such trader within two months from the

filing of such affidavit." Therefore, to bring a trader within this section, two things must concur: he must make an admission of *part* of the debt, and make no deposition as to the residue. But the plaintiff did make the deposition, and the bond having been dispensed with under competent authority, the case is the same as it would have been if a bond had been given. This enactment ought to receive a strict construction, inasmuch as it gives the creditor a severe remedy against his debtor: the proceeding being of a penal character. It appears from this section to have been the intention of the legislature that the debtor should not be called upon to pay the admitted portion of the demand until the action as to the residue should be terminated. The costs of that action, to which the trader would be entitled in case of success, may exceed the disputed portion of the demand. He referred to *Smith v. Temperley* (a), *Anon. (b)*, and to the Statutory Rules of the 11th of January, 1853.

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Hugh Hill, contra.—If the various sections of the 12 & 13 Vict. c. 106, which have reference to this question, be read together, it will be found that the present case falls within the Act. By the 79th section a bond is to be given, either for the whole of the demand, or only for a part of it, if a part only be disputed. The 80th section is applicable to two events: first, where the trader does not appear; and secondly, where he appears, but refuses to admit the demand, and to make a deposition. [*Williams, J.*—That section clearly does not apply to the present case.] Section 81, when taken in conjunction with sections 79 and 84, may be read as applying to the case where the trader admits part of the debt only. Now the 82nd section embraces the present case. The words "if any such trader so summoned shall, upon his appearance, sign an admis-

(a) 16 M. & W. 273.

(b) 1 Fonbl. 65.

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sion for part only of such demand, and shall not make a deposition in the form aforesaid, that he believes that he has a good defence upon the merits to the residue of such demand," and shall not pay the same &c. within a specified time, shall be deemed to have committed an act of bankruptcy, must be taken to mean that the trader shall be deemed to have committed an act of bankruptcy, if he does not pay the debt after having either admitted part of the demand, or after having refused to make the deposition. [*Maule, J.*—If the debtor admits part of the demand, and disputes the residue of it, and with respect to that part which he disputes he does all that the Act of Parliament requires him to do, he does not, by non-payment of the admitted part, commit an act of bankruptcy. *Cresswell, J.*—This is an enactment by which a person is made a bankrupt by an entirely new course of proceeding. We cannot read "and" as "or" to effect the defendants' construction. If the creditor makes a mistake by claiming too much, he merely postpones his remedy for a short period.] If the debtor admits the whole of the demand, he is clearly within the statute; and it seems to be inconsistent with the Act that the whole of the proceedings should be rendered nugatory by reason of the debtor's disputing some small portion only of the debt. [*Maule, J.*—The creditor merely loses the remedy which this enactment affords him, of making his debtor a bankrupt by this summary mode of proceeding, but he does not lose his debt. If a trader be summoned for a debt which he admits, well knowing that he has no defence to it, it may be reasonable that the commencement of the bankruptcy should date from the time of the summons. In that case the whole amount is admitted. But where a part of the demand is really disputed, and the debtor makes out that he has a defence on the merits to the disputed part, we may well understand the legislature to say, that a man is not to be made a bankrupt for not paying a portion of a

claim which is not one that he can simply admit. In such case the demand is of a disputed amount, and the creditor must promptly put himself into the way of having the amount settled; and, until that shall have been done, the legislature does not interpose by creating this extraordinary and summary mode of making a man a bankrupt. Where the demand is admitted, the legislature may well say, that the debtor must either pay the debt or become a bankrupt; but where the creditor says, you owe me 150*l.*, and the debtor says, "No, I do not owe you more than 110*l.*," that case appears to me to stand upon a different footing. But whether or not this be the ground upon which this 82nd section is based, the words of the section itself are clear and express.]

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COLERIDGE, J — We (a) are all agreed that the direction of the learned Judge was wrong, and that there must be a *venire de novo*. The reasons for our judgment have been given in the course of the argument; and it will therefore not be necessary to say more upon the question. Our decision proceeds upon the express words of this Act of Parliament. The remedy given by it does not apply to the present case.

Venire de novo.

(a) Coleridge, J., Maule, J., Wightman, J., Cresswell, J., Erle, J., Williams, J., and Talfourd, J.

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THE LONDON AND SOUTH-WESTERN RAILWAY COMPANY v.
THE SOUTH EASTERN RAILWAY COMPANY.

In 1846, the R. Railway Company proposed to make a railway uniting the plaintiffs' and the defendants' lines and another railway. Part of the line proposed to be made ran so nearly in the same direction with part of a branch line proposed to be made by the plaintiffs, that it was proposed that the R. Company

should, for that space, adopt the line to be made by the plaintiffs. The R. Company and the plaintiffs obtained Acts of Parliament in 1846, which came into operation on the same day. By section 44 of the R. Railway Company Act, 9 & 10 Vict. c. clxxi., after reciting that a bill was then pending in Parliament for enabling the plaintiffs' Company to make the portion of the line, and that it was thereby intended that the R. Railway Company should have the use of it for the purposes of their traffic, it was enacted, that, if the plaintiffs' Company did not complete the said portion of the line, the R. Railway Company might make it. And by section 50 of the same Act, the R. Railway Company were empowered to lease their railway to the defendants' Company for such term, and upon such conditions as should be agreed upon between the said two Companies. By the plaintiffs' Company's Act, 9 & 10 Vict. c. clxxiii. s. 17, after reciting that a bill was then pending in Parliament for making the R. Railway, it was enacted, that, in case the said bill should pass into a law, the R. Railway Company might use the said portion of the line, and the stations, warehouses, works, and conveniences belonging thereto, subject to such reasonable terms as should be agreed upon between the plaintiffs' Company and the R. Railway Company. By the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, s. 113, which was incorporated into these special Acts, in cases where a railway is authorised to lease its line or any portion of it, such lease shall entitle the lessees to enjoy all the powers and privileges granted to and enjoyed by their lessors. In 1847 an agreement was entered into between the R. Railway Company and the plaintiffs, to the effect that the R. Railway Company should have the right in perpetuity of using, for the purposes of their traffic, the above-mentioned portion of railway, upon certain specified terms. In 1850 the R. Railway Company leased their line, with all their powers, privileges, and all the benefit and advantage to be derived from the agreement of 1847, to the defendants for 1000 years, subject to the obligations and liabilities of the R. Railway Company:—*Held*, on error, that, by virtue of the special Acts of Parliament, the Railways Clauses Consolidation Act (7 & 8 Vict. c. 20), incorporated therewith, and the lease of 1850, the agreement of 1847 was binding upon the plaintiffs and defendants; and that the defendants were entitled, as against the plaintiffs, to stand, in respect of the agreement, in the situation of the R. Railway Company.

ERROR on a bill of exceptions. This was an action of debt for money had and received, and on accounts stated, brought by the plaintiffs below (the defendants in error) against the defendants below (the plaintiffs in error).

The defendants below pleaded—first, never indebted; and secondly, a set off (*inter alia*) for the use of their line and for the use of the stations, works, &c., and for money had and received.

To this plea, the plaintiffs below replied *nil debent*.

At the trial of the cause, before *Pollock*, C. B., at the Middlesex Sittings after Hilary Term, 1852, the facts of the case, as embodied in the bill of exceptions, appeared to be in substance as follows:—

On the 16th of April, 1847, and after the passing of "The Reading, Guildford, and Reigate Railway Act, 1846," 9 & 10 Vict. c. clxxi.; "The London and South Western, Farnham, and Alton Branch Act, 1846," 9 & 10 Vict. c. clxxiii.; and "The Guildford Extension, and Portsmouth and Fareham Railway Act, 1845," 9 & 10 Vict. c. cclii. (a),

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(a) The following sections of the special Acts are material to the present question:—

The 9 & 10 Vict. c. clxxi.:—

Sect. 43 enacts, "And whereas a bill is now pending in Parliament, intituled 'A Bill for making a Railway from Guildford to Chichester, and from Fareham to Portsmouth, with branches to Petersfield, in the county of Hants, and to Chichester Harbour, in the county of Sussex,' and the railway hereby authorised to be made is proposed to pass in or near the same direction as the said intended railway from Guildford to Chichester, between a lane at Artington, No. 18, in the parish of Saint Nicholas, Guildford, on the deposited plans and books of reference of the railway hereby authorised to be made, and the present terminus, at Guildford, of the said London and South Western Railway; and if the said bill for making the said Guildford and Chichester Railway shall pass into a law, it is intended that the Company hereby incorporated shall, for the purposes of their traffic, use such part of the said intended Guildford and Chichester Railway as shall be situate between the points aforesaid, and that the railway hereby authorised to be

made shall not be executed between the same points: Be it therefore enacted, that, in case the said bill for making the said railway from Guildford to Chichester shall pass into a law during the present session, it shall not be lawful for the Company hereby incorporated, without the consent in writing of the Company which shall be incorporated for making the said Guildford and Chichester Railway, to purchase, take, enter upon, or use any of the lands delineated on the deposited plans and described on the deposited books of reference of the railway hereby authorised to be made between the points aforesaid, except for the purpose of forming a convenient junction between so much of the railway hereby authorised to be made as shall be situate to the east of the same lane and the said intended Guildford and Chichester Railway: Provided always, that, if, at the expiration of twelve calendar months from the passing of the said bill for making the said Guildford and Chichester Railway, the Company thereby incorporated shall not have proceeded bonâ fide to purchase the lands required for that portion thereof lying between Guildford and Godalming,

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the Reading, Guildford, and Reigate Railway Company of the one part, and the London and South Western Rail-

and otherwise in execution of the powers granted to them in reference thereto, and shall not, within two years and a half from the passing of the said bill, have completed the said railway between the points aforesaid with a double line of rails, the Company hereby incorporated shall be at liberty at any time thereafter, subject to the provisions of this Act, but without the consent of the said Company incorporated for making the said Guildford and Chichester Railway, to contract for, enter upon, and use all such lands as they are hereby authorised to take and use between the points last aforesaid, and to construct the railway hereby authorised to be made upon and through the said last-mentioned lands accordingly."

Sect. 44 enacts, "And whereas a bill is now pending in Parliament for enabling the London and South Western Railway Company to make a branch railway to Farnham and Alton, and if the said bill shall pass into a law, it is intended that the Company hereby incorporated shall, for the purposes of their traffic, use certain parts of the said intended branch railway, situate between the Guildford branch of the said London and South Western Railway and a point in the said parish of Worplesdon, and that the railway hereby authorised to be made shall not be exe-

cuted between the same points: Be it therefore enacted, that, in case the said bill for making the said branch railway shall pass into a law during the present session of Parliament, it shall not be lawful for the Company hereby incorporated, without the consent in writing of the London and South Western Railway Company under their common seal first had and obtained, to contract for, purchase, take, enter upon, or use any of the lands delineated on the deposited plans and described in the deposited books of reference of the railway hereby authorised to be made between the said Guildford branch of the London and South Western Railway, and the field, No. 75, in the parish of Worplesdon, in the plan deposited with the clerk of the peace of the county of Surrey, except for the purpose of forming a convenient junction between so much of the line hereby authorised to be made as shall be situate to the west of the same field and the said intended branch railway to Farnham and Alton aforesaid: Provided always, that, if at the expiration of twelve calendar months from the passing of the said bill for making the said Farnham and Alton Branch Railway, the said London and South Western Railway Company shall not have bona fide proceeded to purchase the lands required for the formation thereof, and other-

way Company of the other part, entered into an agreement under seal. This agreement, after reciting the pre-

wise in execution of the powers granted to them in reference thereto, and shall not, within two years and a half from the passing of the said bill, have completed the said railway between the points aforesaid with a double line of rails, the Company hereby incorporated shall be at liberty, at any time thereafter, subject to the provisions of this Act, but without the consent of the said London and South Western Railway Company, to contract for, enter upon, and use all such lands as they are hereby authorised to take and use between the points aforesaid, and to construct the railway hereby authorised to be made upon and through the same last-mentioned lands accordingly."

Sect. 50 enacts, "That it shall be lawful for the Company to demise or lease the said railway to the South Eastern Railway Company for such term and upon such conditions as shall be or as shall have been agreed upon between the said Companies, and to carry into effect any arrangement, not inconsistent with any of the provisions hereinbefore contained, that shall be or shall have been agreed upon between the said Companies, subject nevertheless to the provision next hereinafter contained."

Sect. 51 enacts, "That the Company shall, subject to the provisions of this Act, forthwith commence and bonâ fide proceed

with the construction of the railway, so that the same may be completed throughout from the terminus at Reading to the terminus at Reigate within the period aforesaid; and that it shall not be lawful for them to enter into any agreement with the South Eastern Railway Company, whereby or in consequence whereof, through exercise of the powers of this Act, a portion only of railway, and especially that portion thereof which lies between the said terminus at Reigate and the town of Dorking, may have to be constructed to the abandonment of the other portion of the said railway, and all such agreements shall be and the same are hereby declared to be void and of no effect."

The 9 & 10 Vict. c. clxxiii. a. 17, enacts, "And whereas a bill is now pending in Parliament for making a railway from Reading to Guildford and Reigate, and it is thereby proposed to incorporate a Company, to be called 'The Reading, Guildford, and Reigate Railway Company,' and to authorise such Company to make and maintain a railway communication between the Great Western Railway at Reading, and the London and Brighton and South Eastern Railways at Reigate: And whereas the line, as originally proposed for the said railway, follows nearly the same direction as the railway hereby

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ceding Acts, and that the Reading, Guildford, and Reigate Railway Act, 1846, whereby the Reading Railway Compa-

authorised to be made between a field in the parish of Worplesdon, numbered 75 on the plans of the Reading, Guildford, and Reigate Railway, deposited with the Clerk of the Peace of the county of Surrey, and the Guildford Junction Railway; and it is proposed that between the said points the traffic of the said proposed Reading, Guildford, and Reigate Railway should adopt the line of railway by this Act authorised: Be it therefore enacted, That, if the said bill for making the said Reading, Guildford, and Reigate Railway shall pass into a law during the present session of Parliament, it shall be lawful for the Company thereby incorporated, subject to the provisions contained in the said 'Lands Clauses Consolidation Act, 1845,' and 'Railways Clauses Consolidation Act, 1845,' and the said recited Acts and this Act, to use the railway hereby authorised to be made between the points aforesaid and the stations, warehouses, works, and conveniences belonging thereto, or any of them, or any part or parts thereof, for the purpose of accommodating the traffic of the said Reading, Guildford, and Reigate Railway requiring to pass between the said points, subject to such reasonable regulations and upon such terms and conditions as may from time to time be agreed upon, or as may already have been agreed upon between the London and South

Western Railway Company, and the said Reading, Guildford, and Reigate Railway Company; and in case the said Companies shall differ as to the terms and conditions on which the said Reading, Guildford, and Reigate Railway Company shall be entitled to use the railway hereby authorised to be made between the points aforesaid, or the stations, warehouses, works, and conveniences belonging thereto, such terms and conditions shall be from time to time settled and determined between the said Companies by arbitration in the manner provided by 'The Railways Clauses Consolidation Act, 1845;' and in case the parties cannot agree on an umpire, such umpire shall, on the application of either of them, be appointed by the Board of Trade."

9 & 10 Vict. c. cclii., s. 37, after reciting that a "bill is now pending in Parliament for making a railway from Reading to Guildford and Reigate, and it is thereby proposed to incorporate a Company, to be called the Reading, Guildford, Reigate Railway Company, and to authorise such Company to make and maintain a railway communication between the Great Western Railway at Reading, and the London and Brighton and South Eastern Railways at Reigate: And whereas the line as originally proposed for the said railway follows nearly the same direction as the rail-

ny were empowered to make the Reading, Guildford, and Reigate Railway (thereinafter referred to as the Reading

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way hereby proposed to be made between the Guildford Junction Railway and land numbered 18 in the parish of Saint Nicholas, Guildford, on the plan of the said Reading, Guildford, and Reigate Railway, deposited with the Clerk of the Peace for the county of Surrey, and it is proposed that between the said points the traffic of the said proposed Reading, Guildford, and Reigate Railway should adopt the line of railway by this Act authorised," enacts, "That if the said bill for making the said Reading, Guildford, and Reigate Railway shall pass into a law during the present session of Parliament, it shall be lawful for the Company thereby incorporated, subject to the provisions of the said recited Acts and this Act, to use the railway hereby authorised to be made between the said Guildford Junction Railway and the said land numbered 18 in the parish of Saint Nicholas, Guildford, aforesaid, and the stations, warehouses, works, and conveniences belonging thereto, or any of them, or any part or parts thereof, subject to such reasonable regulations and upon such terms and conditions as may from time to time be agreed upon, or as may already have been agreed upon between the Company hereby incorporated and the said Reading, Guildford, and Reigate Railway Company; and in case the said Companies shall differ as to the terms and condi-

tions on which the said Reading, Guildford, and Reigate Company shall be entitled to use the railway hereby authorised to be made between the points aforesaid, or the stations, warehouses, works, and conveniences belonging thereto, such terms and conditions shall be from time to time settled and determined between the said Companies by arbitration in the manner provided by the Railways Clauses Consolidation Act, 1845; and in case the parties cannot agree on an umpire, such umpire shall, on the application of either of them, be appointed by the Board of Trade."

The Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, which is incorporated into the special Acts, by sect. 112 enacts, that "Where the Company shall be authorised by the special Act to lease the railway, or any part thereof, to any Company or person, the lease to be executed in pursuance of such authority shall contain all usual and proper covenants on the part of the lessee for maintaining the railway, or the portion thereof comprised in such lease, in good and efficient repair and working condition during the continuance thereof, and for so leaving the same at the expiration of the term thereby granted, and such other provisions, conditions, covenants, and agreements as are usually inserted in leases of a like nature."

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Railway), through the several places, and, among others, Ash, Worplesdon, and Artington, within and without the borough of Guildford, all in the county of Surrey; And that the line, as originally proposed for the Reading Railway, followed nearly the same course as the continuous line from a point of junction with the continuous line in a field in Worplesdon aforesaid, numbered 75 in the parish of Worplesdon in the plans of the same railway deposited with the clerk of the peace of the county of Surrey, to a point of junction with the continuous line in a lane in Artington aforesaid, numbered 18 in the parish of Artington in such plans; And that, prior to the passing of the recited Acts, it was proposed that between such points the traffic of the Reading Railway should adopt, use, and work over the continuous line; and certain terms of agreement were made between the directors of the said Railway Company and the South Western Company, and certain of the clauses of the recited Acts were introduced into the same respectively accordingly; And that it had been agreed between the said companies, parties hereto, to enter into such agreement as thereafter appearing, for altering, if Parliament would permit, such point of junction in Wor-

Sect. 113 enacts, that "Such lease shall entitle the Company or person to whom the same shall be granted to the free use of the railway, or portion of railway comprised therein, and during the continuance of any such lease all the powers and privileges granted to and which might otherwise be exercised and enjoyed by the Company or the directors thereof, or their officers, agents, or servants, by virtue of this or the special Act, with regard to the possession, enjoyment, and management of the railway, or of

the part thereof comprised in such lease, and the tolls to be taken thereon, shall be exercised and enjoyed by the lessee, and the officers and servants of such lessee, under the same regulations and restrictions as are by this or the special Act imposed on the Company, and their directors, officers, and servants; and such lessee shall, with respect to the railway comprised in such lease, be subject to all the obligations by this or the special Act imposed on the Company."

plesdon aforesaid, and in other respects to confirm, in pursuance of the said Acts, the said terms of agreement,—did thereby witness that it was thereby contracted and agreed, by and between the said Companies, parties to the said agreement, that if the authority of Parliament can be obtained for that purpose, the junction of the Reading Railway with the continuous line shall not be made in the said field No. 75, but shall be made in or near a field in Worplesdon aforesaid, No. 70 in the plans of the Farnham and Alton Branch Railway, deposited with the clerk of the peace, &c., and referred to in the first recited Act. That the Reading Company shall have the right to use and work over in perpetuity, with their own engines and carriages, the continuous line between the actual point of junction in Worplesdon aforesaid, wherever the point may be, and the said point of junction in Artington aforesaid; and to use the present station in Guildford of the continuous line, and all other stations, and all warehouses, works, and conveniences between such points of junction belonging to the continuous line, for the purpose of carrying and accommodating all the traffic of the Reading Railway requiring to pass over all or any part of the continuous line, and also over all or any part of the said Reading Railway, but not for the purpose of carrying or accommodating any traffic which, if the Reading Railway were not constructed, could be carried or accommodated by the South Western Railway Company exclusively on the said continuous line. That the Reading Railway Company shall pay to the South Western Railway Company, by half-yearly payments, on the 24th of June and the 24th of December in every year for such use a sum equal to thirty-five per cent., calculated upon the gross amounts to be received by the Reading Railway Company for such part of their traffic as shall pass over all or any part of the continuous line, the amount of such gross receipts to be determined by an equal mileage division of the entire fares or charges for

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the same traffic. That, in order to enable such gross receipts to be ascertained, the Reading Railway Company shall keep distinct and sufficient accounts, with proper vouchers, of the entire fares or charges for the same traffic, with all such particulars as shall be proper for the due explanation of such accounts; and shall, within fourteen days next after every such half-yearly day for payment, deliver to the South Western Railway Company a true copy of such accounts for the half-year ending on such day, and shall, at all reasonable times, permit such accounts and vouchers respectively to be examined and transmitted by such person or persons (not at any one time exceeding three persons), as the South Western Railway Company shall from time to time appoint. That, in every case of difference between the said Companies, parties hereto, as to the foregoing stipulations or any of them, either in regard to construction or otherwise, such difference shall be referred to arbitration, as provided by "The Railways Clauses Consolidation Act, 1845." Provided always, that the agreements hereinbefore contained shall be subject to the said recited Acts; and also, that nothing herein contained shall restrict the Reading Railway Company, subject to the provisions of the recited Acts, from forthwith commencing, and bonâ fide proceeding with the construction of the Reading Railway, according to the provisions of their Act.

By an indenture, made the 15th of March, 1850, between the Reading, Guildford, and Reigate Railway Company of the one part, and the South Eastern Railway Company of the other part, after reciting the 9 & 10 Vict. c. clxxi., and the other Acts relating to the former Company, the former Company did thereby demise to the South Eastern Railway Company for the term of 1000 years all the railway and works connected therewith, which had been made under the authority of the several Acts by the Reading, Guildford, and Reigate Railway Company, and

all the other undertakings of that Company, and all the termini, stations, warehouses, engine-houses, &c., then or thereafter to be connected with the said railways or any of them, and the free use and enjoyment of all the said railways, works, and undertakings thereby demised, and all tolls, rates, &c. in respect of the said railways, and all the powers and privileges granted to and which might, but for this indenture, be exercised or enjoyed by the said Reading Railway Company, or their officers, &c., by virtue of the thereinbefore recited Acts with regard to the possession, use, enjoyment, and management and construction of the said railways and other works, and the tolls and rates, as might be vested in or capable of being exercised by the said South Eastern Railway Company, their successors or assigns, in order that they might receive and enjoy the full benefit of the demise therein contained, and also all benefit and advantage of the said agreement of the 16th of April, 1847, so as aforesaid entered into by and between the said Reading Railway Company and the said London and South Western Railway Company, and subject nevertheless to all obligations and liabilities imposed upon the said Reading Railway Company by virtue of such agreement, which should thenceforth be observed, together with all ways, easements, privileges, &c., to the said railways, lands, &c., belonging, then or at anytime thereafter to be held, used, occupied, or enjoyed, as part of them, together with full liberty and power to and for the said South Eastern Railway Company, their successors or assigns, so far as the said Reading Railway Company were, under the said Acts, capable of granting the same, from time to time, at their discretion, to construct any new works upon the line of the said railways and lands thereby demised, and to alter all or any of the works hereby demised, &c.

This agreement, amongst other conditions, was subject to a proviso for re-entry by the Reading Railway Com-

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pany upon the line and works demised, in case of non-payment of a half year's rent six months after it should become due and in arrear.

The plaintiffs further gave in evidence, and it was then mutually admitted and proved, that the defendants had received on the plaintiffs' account, and for the plaintiffs' use, from the 6th of October, 1849, up to the 12th of December, 1851, the sum of 4716*l.* 10*s.* 2*d.*, and which the plaintiffs were entitled to recover in the said action, subject to the right of set-off (if any) of the defendants. That the plaintiffs carried over parts of the defendants' railways, from the 1st of August, 1850, to the 30th of August, 1851, large numbers of passengers, &c. That part of such traffic commenced on the South Eastern Railway, and passing over part of the Reading, Guildford, and Reigate Railway, terminated on one of the defendants' railways (being parts of the continuous line mentioned in the said agreement between the Reading, Guildford, and Reigate Railway Company, and the defendants' Company, of the 16th of April, 1847). That other part commenced on such continuous line, and passing over part of the Reading, Guildford, and Reigate Railway, terminated on the South Eastern Railway; and that other part thereof commenced on the Reading, Guildford, and Reigate Railway, and passed over the said continuous line. That the amount of tolls which the defendants would be entitled to set-off in this action, if entitled to set-off according to the rates hereinafter mentioned, but without prejudice to the rate (if any) at which the defendants were entitled to charge, would be as follows:—According to the rate mentioned in the said agreement between the Reading, Guildford, and Reigate Company, and the defendants, of the 16th of April, 1847, the sum of 729*l.*; according to the mileage rate of 2*d.* per mile for each passenger, the sum of 4194*l.* 10*s.* 4*d.*; according to the six-mile rate mentioned in the statutes, the sum of 5739*l.* 17*s.* The defendants' counsel contended

that they were entitled to a set-off, either of the 5739*l.* 17*s.* or of the 4194*l.* 10*s.* 4*d.* And thereupon the Lord Chief Baron then ruled, and directed the jury, that either the plaintiffs were entitled by virtue of the agreement of the 16th of April, 1847, and of the statutes, to use and work over the parts of the said railways, and the stations, works, warehouses, and conveniences in the said agreement mentioned, for the traffic so proved and admitted as aforesaid, in manner and upon the terms mentioned and provided in the said agreement with reference to the said Reading, Guildford, and Reigate Railway Company. And that, under and by reason of that agreement, and of the statutes mentioned, the plaintiffs were bound to pay, and the defendants would be entitled to receive and to recover from the plaintiffs, for such use, a sum equal to 35*l.* per cent., calculated upon the gross amounts to be received by the plaintiffs for such part of their traffic as should pass over all or any part of the said continuous line, in manner provided by the said agreement, and no more; or that, if the plaintiffs were not, under and by virtue of the said agreement, entitled to such use as aforesaid, and bound to make such payment as aforesaid to the defendants, then that the plaintiffs were entitled to use the said parts of the said railways for the traffic so proved and admitted as aforesaid, under the 50th section of the said Reading, Guildford, and Reigate Railway Act, 1846, and the 17th section of the said London and South Western Farnham and Alton Branch Act, 1846, and the 37th section of the said Guildford Extension and Portsmouth and Fareham Railway Act, 1846; and then that the defendants were not entitled to claim a set-off of any toll or payments, by reason of the regulations, terms, and conditions for the use of the said parts of the said railways and works not having been agreed upon or settled or determined in the special manner provided by the said statutes in that behalf. And that, for the reasons aforesaid, or one of them, the defendants were

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not entitled to any further or greater amount of set-off than 729*l.*; which said sum the Lord Chief Baron then, by consent of the plaintiffs, directed the jury to allow by way of set-off, with leave to the plaintiffs to move to enter a verdict for the full amount claimed, or to treat the case as if a bill of exceptions had been tendered. A rule was accordingly obtained, and was argued in the Court below in last Trinity Term, when the Court supported the ruling of the Lord Chief Baron, but gave the plaintiffs leave to consider the case as if a bill of exceptions had been tendered at the trial.

Error having been suggested thereon, the case was argued (Feb. 2) by

Butt (the *Attorney-General* and *Bovill* with him) for the plaintiffs in error.—The plaintiffs in error contend that they are entitled to a set off beyond the sum of 729*l.* The defendants in error, on the other hand, will contend that, according to the true intention of the legislature, the rights which were enjoyed by the Reading, Reigate, and Guildford Railway Company, passed to the defendants in error, who claim under the last-mentioned Company; and further, that the plaintiffs in error are not even entitled to a set off of 729*l.*, inasmuch as there has not been any settlement of the amount by arbitration.

First—The question arises upon the agreement of the 16th of April, 1846. Now that agreement is not mutually binding upon the parties to this suit. It was entered into between the plaintiffs in error and the Reading, Guildford, and Reigate Railway Company; and there is no specific clause in any of the Acts of Parliament which have reference to the question, by which the defendants in error are entitled to stand in the place of the Reading Company. That agreement does not provide for the event of another railway Company being substituted for all purposes in the place of the Reading Company. The 9 & 10 Vict. c. clxxi.

s. 50, merely empowers the Reading Company to lease their line to the South Eastern Railway Company. But this section does not give the former Company a larger power than to *lease* their line to the South Eastern Railway Company. The Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, which is incorporated into the special Acts of the Reading, Guildford, and Reigate Railway Company, and of the London and South Western Railway Company, which, by sect. 112, provides for the case where a Company is authorised by its special Act to lease the whole or any part of its line to another Company, by section 113 provides that the powers vested in the Company by whom the lease is made, may be exercised by their lessees. The agreement of April, 1846, did not pass, as if annexed to the land, to the South Eastern Railway Company, nor by virtue of the lease of May, 1850, for the following reasons:—The plaintiffs in error were not parties to the latter agreement. The Reading Company exists at the present time, and the lease by which the defendants in error became tenants to the Reading Company for the term of 1000 years might, nevertheless, be determined upon nonpayment of rent. The lease does not in terms profess to pass any contract, and its clauses are not applicable to a state of things differing from that which is expressly provided for by its language. The clauses of the agreement of 1846 are pointedly limited to the traffic of the Reading Company. The inducements which would lead the plaintiffs in error to enter into an agreement with a Company like the Reading Company, might be wholly insufficient to lead them to enter into a similar agreement with the South Eastern Railway Company. Where the Company is changed, the traffic also experiences a change. The percentage would require alteration; and the rate of 35½ per cent., the amount fixed by the agreement of 1847, might be found insufficient to meet the change produced by the substitution of the one Company for the other. The agreement of 1847 is not destroyed by the lease of 1850; for, if

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the lease were to be determined by forfeiture, the Reading Company would be restored to the position which it occupied before the execution of the lease. The lease, therefore, does not of itself pass the contract of 1847 to the defendants in error, so as to make them for all purposes the assignees of the Reading Company; and the 50th section of the 9 & 10 Vict. c. clxxi., which empowers the Reading Company to lease their line to the South Eastern Railway Company has no such effect. If it had been intended by the legislature to give to the Reading Company the power of transferring their contracts with one Company to another Company by deed, the special Acts of Parliament would have contained a clause expressly giving that power. Such a clause is to be found in the special Acts of other Railway Companies.—He also referred to 9 & 10 Vict. c. lxxiii. ss. 17 and 18; 9 & 10 Vict. c. cclii. s. 37; 9 & 10 Vict. c. cxxxi. s. 12; 10 & 11 Vict. c. cxlv. s. 27; and *The Lancashire and Yorkshire Railway Company v. The East Lancashire Railway Company* (a).

Secondly—Assuming that the agreement of 1846 does bind the parties to this suit, the defendants in error contend that, by the 9 & 10 Vict. c. clxxiii. s. 17, the matter ought to have been referred to arbitration. For this section does not affect debts which are due, but is applicable to disputes which may arise upon the terms of agreements made or to be entered into between the two Companies there mentioned.

Sir *F. Kelly* (*Watson, Hoggins, and Willes* with him) contra.—If the first point should be decided in favour of the defendants in error, it will become unnecessary to discuss the second.

First. The agreement of 1847, by virtue of the Acts of Parliament and the lease of 1850, became an agreement

between the parties to this suit, and therefore mutually binding upon them. It appears by the special Acts, that, prior to the agreement of 1847, the London and North Western and the South Eastern Companies were in existence, and that the former of these Companies and another Railway Company meditated the formation of two lines of railway, which, if executed, would have run over nearly the same ground. The legislature, therefore, to avoid the formation of two parallel lines of railway running from and to the same points, and as there was no reason why one Company should be preferred to the other, vested the property of the line in the one Company, at the same time granting to the other Company an equal power of using it for all the necessary purposes of its traffic. With this view the legislature enacted, that the London and South Western Railway Company should be empowered to purchase the land and to form the line, and that the Reading, Guildford, and Reigate Company should be at liberty to use that portion of the line which was so to be executed by the former Company: 9 & 10 Vict. c. clxxi. ss. 43 & 44, and 9 & 10 Vict. c. clxxiii. s. 17. It is clear from the former of these Acts, which empowers the Reading Company to complete the line in case of default by the London and South Western Company, and from the language of the several clauses of these special Acts, that the Reading Company was to have the right not only to run upon the line, but also to use "all the stations, warehouses, works, and conveniences belonging thereto," upon such terms and conditions as should be settled by arbitration under the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20. It is obvious that the free use of this portion of the line by the Reading Company, as a portion of their integral line, was quite essential to their existence as a Railway Company. The legislature had in contemplation three separate matters: first, that this portion of the line should be constructed by the London and South Western Company, and that it should be freely used by the Read-

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ing Company as an integral portion of their own line. Secondly, that the terms of their joint user should be made the subject of a specific agreement between the two Companies. And thirdly, that by one and the same Act the Reading Company might immediately, with all its privileges and rights, be leased to and become the property of the South Eastern Company: in a word, that the latter Company might step into the shoes of the Reading Company. These deductions clearly follow from the 9 & 10 Vict. c. clxxi. ss. 43, 44, & 50 and the 9 & 10 Vict. c. clxxiii. s. 17. Under the 50th section of the 9 & 10 Vict. c. clxxi., the transfer of the line to the South Eastern Company might have been effected upon the day immediately following that upon which the Act came into force. This clause would have no effect if it did not give the power to the Reading Company of transferring all its rights to the South Eastern Company; and although the right of using this line was given to the Reading Company by name, yet in fact it was given to the South Eastern Company also. The 113th section of the Railways Clauses Consolidation Act (7 & 8 Vict. c. 20), in cases where a Company is authorised by its special Act to lease the whole or any portion of its line, substitutes the lessees for the lessors, and gives them the same privileges as their lessors enjoyed. In this case, therefore, the name of the South Eastern Company is to be substituted for that of the Reading, Guildford, and Reigate Company, in the 17th section of the 9 & 10 Vict. c. clxxiii. For these reasons the agreement of 1847 is binding upon the parties to this action.—He also contended, that the agreement ran with the land.

He was stopped by the Court upon the second point, who intimated that they would hear him upon that point if it should become necessary.

Butt replied upon the first point.

Cur. adv. vult.

The judgment of the Court was now delivered by

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WIGHTMAN, J.—The question for the decision of the Court in this case was, whether the plaintiffs in error had an available set-off against the defendants in error, to a greater amount than 729*l*.; and there was no doubt that they had not, if the defendants in error were entitled, as between them and the plaintiffs in error, to insist upon the fulfilment by the latter of an agreement made between them and the Reading, Guildford, and Reigate Railway Company.

It appears by the bill of exceptions and the statutes therein referred to, that, in 1846, a projected Company, to be called the Reading, Guildford, and Reigate Railway Company, proposed to make a railway from Reading to Reigate through Guildford, and at Reigate to join the London and Brighton and South Eastern Railways; and at the same time the London and South Western Railway Company proposed to make a branch railway to Farnham and Alton.

It also appears that the line proposed to be made by the Reading, Guildford, and Reigate Railway Company ran so nearly in the same direction with a part of the branch line proposed to be made by the London and South Western Railway Company, that it was proposed that the Reading, Guildford, and Reigate Railway Company should for that space adopt the line to be made by the London and South Western Railway Company.

Both parties obtained Acts of Parliament on the same day, the 16th of July, 1846.

The Act for making the railway from Reading to Guildford and Reigate is the 9 & 10 Vict. c. clxxi.; and, by section 50, the Company are empowered to lease their railway to the South Eastern Railway Company for such term and upon such conditions as should be and as should have been agreed upon between them.

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The Act for enabling the London and South Western Railway Company to make a branch to Farnham and Alton, is the 9 & 10 Vict. c. clxxiii.; and by section 17, after reciting, that, between certain points mentioned in the Act, it had been proposed that the traffic of the Reading, Guildford, and Reigate Railway should adopt the line authorised by that Act, it was enacted "that it should be lawful for the Reading, Guildford, and Reigate Railway Company to use the railway by that Act authorised to be made between the said points and the stations, warehouses, works, and conveniences belonging thereto, for the purpose of accommodating the traffic of the Reading, Guildford, and Reigate Railway requiring to pass between those points, subject to such reasonable regulations, and upon such terms and conditions as might from time to time be agreed upon, or as might then already have been agreed upon between the London and South Western Railway Company and the Reading, Guildford, and Reigate Railway Company."

The Railways Clauses Consolidation Act (8 & 9 Vict. c. 20), which is, by reference, incorporated with both the special Acts, provides by ss. 112 and 113, that where a Railway Company shall be authorised by the special Act to lease the railway, such lease shall entitle the Company or person to whom the same shall be granted, to the free use of the railway; and that, during the continuance of the lease, all the powers and privileges granted to, and which otherwise might be exercised and enjoyed by the Company, by virtue of that Act or the special Act, with regard to the possession, enjoyment, and management of the railway, should be exercised and enjoyed by the lessees, under the same regulations and restrictions as were by that or the special Act imposed upon the Company.

After these two special Acts had been passed, an agreement was made on the 16th of April, 1847, between the Reading, Guildford, and Reigate Railway Company of the

one part, and the London and South Western Railway Company of the other part, by which the terms and conditions upon which the Reading, Guildford, and Reigate Railway Company should have the right to use for their traffic the part of the line of the London and South Western Branch Railway before referred to, and of the stations, warehouses, &c. belonging thereto, were settled and adjusted; and it was agreed that the Reading, Guildford, and Reigate Railway Company should have such right in perpetuity.

On the 15th of March, 1850, the Reading, Guildford, and Reigate Railway Company, by an indenture of that date, between them and the London and South Eastern Railway Company, reciting all the Acts of Parliament relating to that railway, and the agreement with the London and South Western Railway Company, demised to the London and South Eastern Railway Company, for 1000 years, the Reading, Guildford, and Reigate Railway, and all the undertakings of the Reading, Guildford, and Reigate Railway, and the free use of the railway and the stations &c., and all the powers and privileges which might be exercised and enjoyed by the Reading, Guildford, and Reigate Railway Company, and all the benefit and advantage of the agreement of the 16th of April, 1847, and subject to the obligations and liabilities imposed upon the Reading, Guildford, and Reigate Railway Company.

The London and South Eastern Railway Company contend, that the London and South Western Railway Company are bound to fulfil with them the terms and conditions of the agreement of the 16th of April, 1847, though not made with them, but with the Reading, Guildford, and Reigate Railway Company; and that by the lease and the Acts of Parliament before referred to, the rights and privileges of the Reading, Guildford, and Reigate Railway Company, as well as their liabilities under that agreement, are transferred to and vested in the London and South Eastern Railway Company.

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Upon consideration of the clauses in these statutes, and of the lease and the agreement, we are of opinion that the ruling of the learned Judge was right, and that the plaintiffs in error are not entitled to a greater amount of set off than 729*l*.; and that the defendants in error were entitled to all the privileges given to the Reading, Guildford, and Reigate Railway Company under the agreement of the 16th of April, 1847.

At the time of the making of that agreement, the Reading, Guildford, and Reigate Railway Company had obtained their Act of Parliament, with a clause authorising them to lease their railway to the London and South Eastern Railway Company. They had, however, no continuous line of their own, but for a certain distance were empowered, by the 17th section of the 9 & 10 Vict. c. clxxiii., to use part of the line which the London and South Western Railway Company were authorised to make under that Act, "subject to such regulations and upon such terms and conditions as might be agreed upon between the two Companies." Accordingly, in order to make their line continuous and available for the purposes of traffic, the Reading, Guildford, and Reigate Railway Company, and the London and South Western Railway Company, in pursuance of the Act for making the branch to Farnham and Alton, entered into the agreement of the 16th of April, 1847, for allowing the use of a portion of the railway of the latter, and of their stations &c., in perpetuity, upon certain terms and conditions therein contained. Without the agreement and the powers and privileges given by it, the Reading, Guildford, and Reigate Railway would be comparatively useless and of little value; and the 17th section of the last-mentioned statute removes the difficulty, by expressly authorising the agreement, and providing a mode at the end of the section by which the terms may be settled, in case the Companies could not agree.

The agreement, when made under the authority of the Act of Parliament, bound the two Companies as to the right to use the portion of the railway of the London and South Western Railway Company by the Reading, Guildford, and Reigate Railway Company, in perpetuity, upon the terms and conditions agreed upon by both. Neither could retract, and it was only by force of that agreement, that the rights and privileges contemplated by the 17th section of the 8 & 9 Vict. c. clxxiii. were made effectual. Unless the rights and privileges given by the agreement, with all its terms and conditions, went with the railway, the leasing power would hardly be consistent with the 17th section of the last-mentioned statute or the Railways Clauses Consolidation Act, for the lessees would not have the powers or privileges, which it was clearly contemplated by that section would be necessary for the proper and efficient making of the line.

It is not necessary to consider how far the agreement and the terms of it would be binding between the parties to this suit at common law, as we are of opinion that the effect of the clauses in the statutes before referred to is to vest in the lessees of the Reading, Guildford, and Reigate Railway Company all the rights and privileges granted by the agreement, without which their lease would be comparatively of little value, and indeed could not be carried into full effect at all, until the London and South Eastern Railway Company had made some new arrangement with the London and South Western Railway Company.

The case depends so entirely upon the effect to be attributed to the Acts of Parliament, to which reference has been made, that it is scarcely to be expected that any cases could be found in the books, sufficiently in point in all their circumstances, to assist us in coming to a conclusion upon the point in question; and the opinion we have

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formed is upon a consideration of the Acts of Parliament, and the documents themselves.

There was another question proposed to be raised by the defendants in error, in case our judgment should be against them upon the first, to which we do not think it necessary to advert, as upon the first point we think that the judgment of the Court below should be affirmed.

Judgment affirmed.

MEMORANDUM.

In the present Vacation, *W. M. James*, of Lincoln's Inn, and *H. A. Merewether*, of the Inner Temple, Esquires, Barristers-at-law, were appointed her Majesty's Counsel.

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ASSUMPSIT on a policy of insurance, against the secretary of the "West of England Fire and Life Insurance Company," under the provisions of the 4 Will. 4, c. xxxvii. The declaration stated, that by a policy of insurance made by and on behalf of the Company, and signed by three of the directors, after reciting that the plaintiff, a wood-turner and cabinet-maker, had paid to the Company 3*l.* 16*s.*, and had agreed to pay at Christmas in each year the annual premium of 3*l.* 16*s.* during the continuance of the policy for insuring against loss or damage by fire, on stock manufactured, unmanufactured, and in process, in his workshops and offices adjoining and communicating, brick built, tiled,

The plaintiff effected an insurance against fire on his stock, by a policy which contained the following (among other) conditions:—"That if, in the building insured or containing any property insured, shall be used any steam-engine, stove, &c., or any description of fire-heat other than common

fire-places, or any process of fire-heat be carried on therein, the same must be noticed and allowed on the policy; and if any omission or misrepresentation take place, the policy is void. In case of any circumstance happening after an insurance has been effected, whereby the risk shall in any way be increased, the insured is required to give notice thereof to the Company, and the same must be allowed by indorsement on the policy, otherwise the policy is void. In case of any alteration being made in a building insured, or containing any property insured, or of any steam, steam-engine, stove, &c., or any other description of fire-heat being introduced, notice thereof must be given, and every such alteration must be allowed by indorsement on the policy, and any further premium which the alteration may occasion must be paid; and unless such notice be given, such premium paid, and such indorsement made, no benefit will arise to the insured in case of loss." The plaintiff, who was a cabinet-maker, erected on his premises a brick furnace or boiler, to which he attached a small steam-engine, for the purpose of trying whether it was worth his while to buy the engine to use in his business. On one occasion a fire was lighted and the engine set to work, when it was found to be wholly unfit for the purpose for which the plaintiff required it. A few days afterwards a fire broke out on the plaintiff's premises, by which his stock was consumed. No notice was given to the Company:—*Held*, that the plaintiff could not recover on the policy, since the terms of the conditions applied to the introduction of a steam-engine in a heated state at any time, without notice to the Company; and that it made no difference whether it was used by way of experiment or as an approved mode of carrying on the business, or whether it was used for a longer or a shorter time.

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or slated, situate &c., 800*l*.; and after reciting that two small stoves were then erected within these premises for the purpose of warming the same: it was made known and declared, that so long as the assured should duly pay the said premium to the Company, the capital, stock, and funds of the Company should be subject and liable to pay to the assured all the damage and loss which the assured should suffer by fire on the property therein mentioned. That the proposals and conditions indorsed on the policy were and are as follows. The declaration then set out the descriptions of risk and terms of insurance, which consisted of four classes: Class I.—Not hazardous: Class II.—Hazardous: Class III.—Doubly hazardous: Class IV.—Special hazardous, “to be made by special agreement: On risks of extraordinary hazard, viz. barge or boat-builders, colourmen, cork-burners, coopers, carpenters, cabinet-makers,” &c., “also buildings covered with thatch, in which fire heat is used, with hazardous goods and hazardous trades therein; chemists’ laboratories; and any other risks of more than ordinary hazard, by reason of any steam-engine, stove, kiln, furnace, oven, or other fire-heat used in the process of any manufactory.” The declaration then set out the following (among other) conditions of insurance: “I. Persons upon making insurances are required to give an accurate description of the buildings, erections, property, and effects intended to be insured, according to the description of risks above stated. If the insurance is on stock in trade and goods, the nature of the same and of the buildings or place in which the same are deposited must be truly described; and if, in the buildings insured or containing any property insured, shall be used any steam-engine, stove, kiln, furnace, oven, or any description of fire-heat, other than common fire-places in private houses, or any process of fire-heat be carried on therein, the same must be noticed and allowed in the policy; and if any omission or misrepresentation take place on any of

the foregoing, or any other material point, the policy is void, and the insurance is of no effect. Every insurance attended with particular circumstances of risk must be so specially expressed in the policy; and in case of any circumstance happening after an insurance has been effected, whereby the risk shall in any way be increased, the insured is required to give notice thereof in writing to the Company, and the same must, previous to a loss occurring, be allowed by indorsement on the policy, otherwise the policy is void, and all title to any benefit from the insurance becomes forfeited. IV. In case of any alteration being made in a building insured, or containing any property insured, or of any steam-engine, stove, kiln, furnace, oven, or any other description of fire-heat being introduced, or of any trade, business, process, or operation being carried on, or goods deposited therein, not comprised in the original insurance, or allowed by indorsement thereon, or the making of any communication from one building to another, notice thereof must be given; and every such alteration must be allowed by indorsement on the policy, and any further premium which the alteration may occasion must be paid; and unless such notice be duly given, such premium paid, and such indorsement made, no benefit will arise to the insured in case of loss."—The declaration then averred the payment of the premiums; that the policy was in force; that the plaintiff truly described the nature of the stock in trade and goods insured; that in the building containing the property insured there was not used any steam-engine, stove, &c., or any description of fire-heat other than common fire-places in private houses, except the two stoves so noticed and allowed in the policy, and that no process of fire-heat had been carried on therein; that the insurance was not attended with particular circumstances of risk, nor did any circumstances happen after the insurance had been effected whereby the risk was in any way increased; that no altera-

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tion since the date of the policy had been made in the buildings containing the property insured, nor had any steam-engine, stove, &c., or any description of fire-heat been introduced, nor had any trade, business, process, or operation been carried on, or goods deposited therein not comprised in the original insurance. The declaration then alleged, that stock in trade and goods exceeding the value insured were in the plaintiff's workshops and offices when they were destroyed by fire. It then alleged notice to the Company, and compliance by the plaintiff with the terms of the policy, and assigned as a breach that the defendants had not made good the loss.

Pleas: first, that, after the making of the policy, and before the fire, and during the risk, a circumstance happened within the true intent and meaning of the condition in that behalf, to wit, in the said workshops, offices, and yard, whereby the risk was then permanently increased. Nevertheless, although the plaintiff then had notice thereof, and although a reasonable time had afterwards, and before the happening of the fire and loss, or any part thereof, elapsed for such notice in writing of the happening of the said circumstance to be given to the Company, and for the same, previous to such loss, to be allowed by indorsement on the policy: yet the plaintiff did not at any time, nor did any other person, give such notice in writing or otherwise of the happening of the said circumstance, nor was the same ever allowed by indorsement as aforesaid, or otherwise; and the policy, before the happening of the fire, became void, and all title to any benefit from the said insurance became forfeited.—Verification.

Secondly, that, after the making of the policy of insurance, and before the happening of the fire, &c., a steam-engine, not comprised in the original insurance or policy, was introduced by the plaintiff in the building containing the stock and property so insured, to wit, in the workshops and offices, without the knowledge or consent of the

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Company, in addition to and besides the stoves mentioned and allowed in the policy; and on divers other days and times the steam-engine was then and there, before the happening of the fire and loss, or any part thereof, worked and used, and was permanently fixed upon the premises, and was then intended to be, and would but for the fire have been, constantly and permanently worked and used by the plaintiff and others with his assent in the said workshops and offices during the risk, without the knowledge and assent of the Company during the risk. Nevertheless, although the plaintiff on these several days and times had notice of all the premises in this plea, and although a reasonable time after the introduction and working and using of the steam-engine in manner aforesaid, and before the happening of the fire and loss or any part thereof, had elapsed for the plaintiff to give, and the plaintiff then ought to have given, such notice, and to have had the same introduction, working, and using of the steam-engine allowed as aforesaid; and although, by reason and on occasion of the premises, the plaintiff then ought to and could and might (as he on the days and times well knew) have paid to the Company a further and additional premium upon the policy: yet the plaintiff did not at any time, nor did any other person, give such notice, nor was the introduction, working, or using of the steam-engine at any time allowed by the Company in any manner whatever, nor hath the plaintiff at any time paid the further or additional premium or any part thereof; and that the policy, before the happening of the loss or any part thereof, had become void.—Verification.

The third plea was similar to the second, stating that a “furnace” was introduced; and the fourth plea stated that a “process and operation” was introduced.

Replication—The plaintiff takes issue upon all the defendant’s pleas.

At the trial, before *Pollock*, C. B., at the London Sit-

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tings after last Michaelmas Term, it appeared that, in January, 1849, the plaintiff, who was a wood-turner and cabinet-maker at Hull, effected the policy of insurance set out in the declaration. The plaintiff afterwards entered into an agreement to purchase a small steam-engine, provided it would answer his purpose to use it in his business instead of a boy, to turn a lathe. The engine was accordingly sent to his premises, and a furnace or boiler of brick-work was erected, to which the engine was attached. On one occasion a fire was lighted in the boiler, and the engine set to work, when an attempt was made to turn by means of it; but it was found that the engine was wholly unfit for the purpose for which the plaintiff required it. No notice whatever of the introduction of the steam-engine was given to the Insurance Company. A few days afterwards a fire broke out in the plaintiff's premises, by which his stock was consumed.

It was objected, on the part of the defendant, that the plaintiff could not recover, inasmuch as no notice had been given of the use of the steam-engine, as required by the first or fourth conditions of the policy. For the plaintiff it was contended, that, as the steam-engine was merely used by way of experiment, the want of notice of that circumstance did not avoid the policy. The learned Judge told the jury that, if they were of opinion that the use of the steam-engine was merely temporary and by way of experiment, the policy was not affected by it. The jury found a verdict for the plaintiff, and leave was reserved to the defendant to move to enter the verdict for him, with liberty for the plaintiff to treat the decision of the Court above as the ruling of the learned Judge, and tender a bill of exceptions thereon if such decision should be in favour of the defendant.

Watson, Montagu Chambers, and Willes shewed cause (April 25).—First, the user of the steam-engine for the

mere purpose of ascertaining whether it could be advantageously employed in the plaintiff's business, was not a breach of the conditions of the policy. The instrument ought to receive a fair and liberal construction. The proposals embrace four descriptions of risk. The fourth class, which is described as "special hazardous," includes cabinet-makers, and any other risks of more than ordinary hazard by reason of any steam-engine, stove, &c., or other fire-heat used in the process of any manufactory. The conditions must be construed with reference to the proposals or classes of risk, and, under the conditions, no notice need be given, except where the alteration or circumstances happening are of such a nature that the assured would have been bound by the proposals to declare them, if they had existed at the time he effected the policy. The first condition requires a notice and allowance on the policy, "if, in the buildings insured or containing any property insured, shall be *used* any steam-engine," &c. The word "*used*" means a permanent user in the process of manufacture carried on in the particular buildings, and has no reference to the trial of a steam-engine by way of experiment. The object of the clause is to enable the Company to exercise their option of either charging a rate of premium proportionate to the increased risk, or of declining the insurance. That such is the meaning of the term "*used*" is evident from the words which follow, "*or any process of fire-heat be carried on therein*"—that is, carried on in the ordinary course of business. The subsequent words "*and in case of any circumstances happening after an insurance has been effected, whereby the risk shall in any way be increased,*" mean, if any circumstance shall happen other than what is provided for by the fourth condition. For instance, if part of a building was destroyed by lightning, whereby the remainder was rendered doubly hazardous, notice must be given of that circumstance. But the circumstance must be of such a nature as permanently to affect the risk. Could it be said that the policy would be avoided if a plumber

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in repairing the building used on one occasion a brazier for heating his iron? The fourth condition provides for four distinct cases: first, "in case of any alteration being made in a building"—secondly, "or of any steam-engine, stove, kiln, furnace, oven, or any other description of fire-heat being introduced"—there the term "introduced" has the same meaning as the word "used" in the first condition, that is, introduced for the purpose of a permanent user;—thirdly, "or of any trade, business, process, or operation being carried on, or goods deposited therein, not comprised in the original insurance, or allowed by indorsement thereon"—that again has reference to the permanent mode of carrying on the particular business;—fourthly, "or the making of any communication from one building to another"—a breach in a wall for the purpose of experiment would not be a "communication" within the meaning of that provision. The condition then requires that notice shall be given, and the alteration allowed by indorsement on the policy, and any further premium paid; the object being that thenceforward the insurance shall be upon the altered condition of the property. That can apply only to permanent alterations; for, unless the notice be given after the alteration is complete, it cannot be indorsed on the policy. *Shaw v. Robberds* (a) is an authority in point. There the plaintiff insured his premises by the description of a "granary and a kiln for drying corn in use." The policy contained a similar condition requiring notice if any alteration were made in the building, or the risk of fire increased. The plaintiff carried on no trade in the kiln except drying corn, but on one occasion he allowed the owner of some bark to dry it gratuitously in the kiln, whereby the premises were destroyed by fire; and it was held that the plaintiff was not precluded from recovering, either on the ground of an alteration of risk, or because the fire arose from negligence. [*Parke, B.*—This condition is dif-

(a) 6 A. & E. 75.

ferently worded: there the words were, "if any alteration or addition be made in or to the building &c., or the risk of fire to which such building is exposed by any means increased." In *Barrett v. Jermy* (a), where there was a similar condition, the Court expressed an opinion that the mere casual use of something hazardous would not avoid the policy. *Whitehead v. Price* (b), *Mayall v. Mitford* (c) and *Pim v. Reid* (d), are also authorities in support of the construction contended for.—They then argued, secondly, that the pleas were not proved, inasmuch as there was no evidence that the steam-engine was intended to be permanently used.

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Sir *F. Thesiger*, *Bovill*, and *Karslake* in support of the rule.—In none of the authorities cited was the language of the conditions like the present. This policy was effected after those cases were decided, and terms have been introduced into these conditions with reference to those decisions. It is no doubt important to look to the proposals or descriptions of risk. This policy ranges under the fourth class, and was the subject of special agreement. The first part of the first condition relates to the state of things at the time of effecting the policy. It requires an accurate description of the property proposed to be insured, that is, such a description as will enable the Company to ascertain under what head the risk is to be classed. It then provides that, if in the buildings there "shall be *used* any steam-engine &c., or any description of fire-heat, &c. or any process of fire-heat be carried on therein, the same must be noticed and allowed in the policy." That refers to the ordinary user of a steam-engine or fire-heat at the time the policy is effected. The condition then provides, that "every insurance attended with particular circumstances of risk must be so specially expressed in the policy; and in case of any circumstance happening after any

(a) 3 Exch. 535.

(b) 2 C. M. & R. 447.

(c) 6 A. & E. 670.

(d) 6 M. & Gr. 1.

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insurance has been effected, whereby the risk shall in any way be increased," the insured is required to give notice. The mere circumstance of there being on the premises a steam-engine, which had never been used nor was intended to be used, would not render a notice necessary; but it would be otherwise if the steam-engine either had been or was intended to be used, or was applied to a purpose different from that stated in the policy. The first condition having thus provided for the risk of a steam-engine or fire-heat being used on the premises, the fourth condition goes on to provide for a specific alteration, and the *introduction* of a steam-engine or fire-heat. The object of that condition was, to protect the Company from risk not provided for by the general terms of the first condition, and to guard against the introduction of any thing by which the risk would be even momentarily increased. It is immaterial with what intention the steam-engine was erected: as much danger might arise from a casual experiment as from its habitual use. The term "introduced" means used as a steam-engine. In *Dobson v. Sotheby* (a), Lord *Tenterden* speaks of fire being *introduced*, in contradistinction to its habitual use. *Shaw v. Robberds* (b) was decided on the particular language of the condition. Here, in addition to the words "any trade or business," are inserted "process or operation being carried on not comprised in the original insurance." In *Pimm v. Reid* (c), the condition referred solely to the time when the policy was effected. *Barrett v. Jermy* (d) turned on the defective finding of the jury. *Whitehead v. Price* (e) and *Mayall v. Mitford* (f) are different from this case. In fact, none of the authorities are directly applicable to the construction of this policy, although in one sense they have an important bearing on it, since in those cases there was an absence of the terms here inserted, and it would seem that,

(a) Moo. & M. 90.

(b) 6 A. & E. 75.

(c) 6 M. & Gr. 1.

(d) 3 Exch. 535.

(e) 2 C. M. & R. 447.

(f) 6 A. & E. 670.

if similar words had been there used, the decisions would have been different.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—We are of opinion that the rule in this case to enter a verdict for the defendant must be made absolute. The question turns entirely on the meaning of the first and fourth conditions of insurance indorsed on the policy, which are made the subject of the first, second, third, and fourth pleas in this action; and the point to be decided is, whether the placing a small steam-engine on the premises, with a boiler attached, and using it in a heated state, for the purpose of turning a lathe, not in the course of the plaintiff's business as a cabinet-maker, but for the purpose of ascertaining, by experiment, whether it was worth his while to buy it, to be used in that business, avoids the policy under either of those conditions. It appears to have been on the premises insured for several days, and then the fire happened, whether in consequence of the steam-engine having been worked or not is quite immaterial. The Chief Baron told the jury, that if the user was merely temporary, and by way of experiment, the policy was not avoided under either of the conditions; but reserved liberty to the defendant to move to enter a verdict on the four pleas, or one of them, and gave the plaintiff the power of treating the opinion of the Court as his opinion, and tendering a bill of exceptions, if it should be in favour of the defendant.

These conditions are to be construed fairly between the parties, and we must endeavour to ascertain their meaning, by adopting the ordinary rules of construction. The fourth condition is the most applicable to the case of the defendant. It provides,—“In case of any alteration being made in a building insured, or containing any property insured, or of any steam-engine, stove, kiln, fur-

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nace, oven, or any other description of fire-heat being introduced, or of any trade, business, process, or operation being carried on, or goods deposited therein, not comprised in the original insurance, or allowed by indorsement thereon, or the making of any communication from one building to another, notice thereof must be given, and every such alteration must be allowed by indorsement on the policy, and any further premium which the alteration may occasion must be paid; and, unless such notice be duly given, such premium paid, and such indorsement made, no benefit will arise to the insured in case of loss."

Now the clause in question implies, that the simple introduction of a steam-engine, without having fire applied to it, will not affect the policy; but if used with fire-heat, it will; and nothing being said about the intention of the parties as to the particular use of it, and as, if it be used, the danger is precisely the same, with whatever object it is used, it seems to us that it makes no difference, whether it is used upon trial with the intent of ascertaining whether it will succeed or not, or as an approved means of carrying on the plaintiff's business, nor does it make any difference that it is used for a longer or a shorter time. The terms of the conditions apply to the introduction of a steam-engine in a heated state at any time, without notice to the Company, so as to afford an opportunity to them to ascertain whether it will increase the risk or not.

The clause proceeds to provide, that every such *alteration* must be allowed by indorsement on the policy, and the premium paid, and, if not, no benefit will arise to the insured in case of loss. The expression "alteration" is inaccurate; but it obviously means to embrace all the circumstances before mentioned, though all are not properly speaking alterations. This appears to be the natural and ordinary construction of this part of the contract, and it is far from unreasonable. In such cases, which are unquestionably likely to increase the risk, the Company sti-

pulated for notice in clear terms, in order that they may consider whether they will continue their liability, and on what terms.

There is not a word to confine the introduction of the steam-engine to its intended use as an instrument or auxiliary in carrying on the business in the premises insured. If a construction had already been put on a clause precisely similar in any decided case, we should defer to that authority. But in truth there is none. All the cases upon this subject depend upon the construction of different instruments, and there is none precisely like this. Indeed, it seems not improbable, that the terms of this policy have been adopted, as suggested by Sir *F. Thesiger*, to prevent the effect of previous decisions;—the provision “that no description of fire-heat shall be introduced,” in consequence of the ruling of Lord *Tenterden* in *Dobson v. Sotheby* (a); and the addition of “process or operation” to trade or business, to prevent the application of that of *Shaw v. Robberds* (b). The latter case is the only one which approaches the present. One cannot help feeling that the construction of the policy in that case may have been somewhat influenced by the apparent hardship of avoiding it, by reason of the accidental and charitable use of the kiln, the subject of the insurance. The Court considered the conditions in that case to refer to alterations either in the building or the business, and to those only. Here, the introduction of steam-engines, or any other description of fire-heat, is specifically pointed at, and expressly provided for. If, in that case, the condition had been (*inter alia*), that no bark should be dried in the kiln without notice to the Company, which would have resembled this case, we are far from thinking that the Court could have held, that the drying which took place did not avoid the policy, by reason of its being an extraordinary occurrence and an act of charity. We are, therefore, of opinion that the

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defendants are entitled to our judgment, and that the material part of the second plea is proved. The averment, that the introduction of the steam-engine was of a permanent nature, and would have been continued if the fire had not taken place, is quite immaterial. The plaintiff will have the option of putting the opinion of the Court in the form of a direction by the Lord Chief Baron, on a bill of exceptions.

Judgment for the defendants.

April 21.

MORGAN and Another v. JONES.

The owner of a vessel mortgaged it as a security for a debt, with a proviso for redemption on payment of the principal monies and interest at the rate of 10*l.* per cent. in six months. The principal not having been paid at that time:—*Held*, that interest continued payable at the rate of 10*l.* per cent.

ASSUMPSIT for money had and received for the use of the plaintiffs.—Plea, Non assumpsit.

At the trial, before *Wightman*, J., at the last Cardigan-shire Spring Assizes, the following facts appeared:—The plaintiffs, being the owners of six-sixteenths of a sloop called the “*Mary Anne*,” in September, 1849, mortgaged their interest in the vessel to the defendant, as a security for the sum of 58*l.* The mortgage deed, which was in the ordinary form, contained an absolute assignment to the defendant of the six-sixteenths of the vessel, with a proviso for redemption on payment of the principal money and interest at the rate of 10*l.* per cent., in six months after the execution of the deed. There was no provision for payment of interest after the expiration of the six months. In September, 1852, a judgment having been obtained against the plaintiffs by another creditor in a county court, their interest in the vessel was taken in execution and sold, when the defendant became the purchaser of it for 115*l.* The defendant claimed to retain out of the purchase-money his debt of 58*l.*, together with arrears of interest at the rate of 10*l.* per cent. up to that period, and expenses, amounting in the whole to 78*l.* 17*s.* 6*d.*, and he paid over the balance of the 115*l.* to the county court bailiff.

It was contended, on the part of the plaintiffs, that the defendant could not claim at all events more than 5*l.* per cent. interest after the expiration of the six months from the date of the mortgage, and consequently they were entitled to recover the excess as money received to their use.

The learned Judge was of opinion that, as the principal was not paid at the time specified, the interest continued payable at the same rate, and a verdict was found for the defendant.

Benson now moved for a new trial, on the ground of misdirection.—From the time of the forfeiture the defendant, as mortgagee, became the absolute owner of the plaintiffs' interest in the vessel, and entitled to claim their share of the freight, and he cannot also be entitled to 10*l.* per cent. interest. [*Parke*, B.—It was a sale of a chattel, redeemable on a certain day; then, if the mortgagors do not avail themselves of that provision, the same rate of interest continues payable. It is exactly like a mortgage of real estate, where the mortgagee becomes the legal owner.] The reservation of interest up to a certain day excludes the presumption of its being payable after that time. [*Martin*, B.—*Price v. The Great Western Railway Company* (a) in effect decides this case.]

PER CURIAM (b).—There ought to be no rule.

Rule refused.

(a) 16 M. & W. 244.

(b) *Pollock*, C. B., *Parke*, B., *Platt*, B., and *Martin*, B.

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SEMPLE v. STEINAU.

In an action for a breach of contract, in not paying interest on an overdue bill of exchange, the plaintiff tendered in evidence the following unstamped agreement, addressed to him, and signed by the defendant:—

"In consideration of your discounting for me a bill of exchange of 100*l.*, drawn by J. R. on E. U., dated the 5th of August instant, payable at one month after date, I hereby undertake and agree, that if the said bill is not paid at maturity, to pay you interest at the rate of 1*s.* in the pound per month, till the whole is fully paid and satisfied:—"

Held, that the agreement was admissible without a stamp, the subject-matter of it being the payment of interest of less value than 20*l.*

ASSUMPSIT.—The declaration stated that, in consideration that the plaintiff would discount for the defendant a bill of exchange for 100*l.* drawn &c. (describing the bill), the defendant agreed with the plaintiff that, if the bill should not be paid at maturity, he, the defendant, would pay to the plaintiff interest at the rate of one shilling in the pound per month, till the whole should be paid. Averment, that the bill was not paid at maturity. Breach, nonpayment of the interest.—Plea, non assumpsit.

At the trial, before *Alderson*, B., at the Middlesex Sitings in the present Term, it appeared that the action was brought to recover the sum of 50*l.*, for ten months' interest on the bill of exchange mentioned in the declaration, and which the plaintiff had discounted for the defendant under the following agreement, addressed to the plaintiff, and signed by the defendant:—

"In consideration of your discounting for me a bill of exchange of 100*l.*, drawn by Jules Rochat on E. Upton, dated the 5th of August instant, payable at one month after date, I hereby undertake and agree, that if the said bill is not paid at maturity, to pay you interest at the rate of one shilling in the pound per month, till the whole is fully paid and satisfied. "M. STEINAU."

The above agreement being unstamped, it was objected, on the part of the defendant, that it was inadmissible in evidence, inasmuch as the subject-matter of it was above the value of 20*l.* The learned Judge received the evidence, and a verdict was found for the plaintiff, leave being reserved to the defendant to move to enter a nonsuit, if the Court should be of opinion that the agreement ought to have been stamped.

Bramwell now moved accordingly.—The document ought to have been stamped under the 55 Geo. 3, c. 184, Schedule, Part 1, tit. "Agreement." The subject matter of the agreement was not the payment of interest, but the discount of a bill of exchange for 100*l*. Suppose the document had been drawn up in a synallagmatic instead of a unilateral form (a), thus—"I agree to discount the bill for 100*l*., and I agree to pay interest at the rate of 10*l*. per cent. until it is paid." It is in effect a purchase of the bill for the considerations mentioned in the agreement. [*Parke, B.*—In *Mullett v. Hutchison* (b) the memorandum was "I have in my hands three bills, which amount to 120*l*. 10*s*. 6*d*., which I have to get discounted, or return on demand," and that was held not to require a stamp. In a subsequent case of *Doe d. Frankis v. Frankis* (c), *Coleridge, J.*, expressed himself dissatisfied with that decision, but Lord *Denman* approved of it. And in the case of *Cox v. Bailey* (d), an indemnity given on the withdrawal of a distress for 24*s*. was admitted in evidence without a stamp, although the sum sought to be recovered exceeded 20*l*. *Martin, B.*—In *Latham v. Rutley* (e), a carrier gave a memorandum in these terms—"Received of Z. & Co. a paper parcel, directed to Messrs. H. B., value 260*l*., which we agree to deliver to them to-morrow," and that was held not to require a stamp.] The cases relating to wharfingers and carriers are distinguishable. In *Chadwick v. Sills* (f), an unstamped memorandum by a wharfinger of the receipt of goods, to be shipped in a particular manner, was admitted in evidence, to shew the terms on which they were received, although the value of the goods was above 20*l*., the wharfage being 7*s*. 6*d*. only. But there the subject matter of the contract was the wharfage. So,

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(a) See Pothier, *Traité des Obligations*, pt. 1, ch. 1, s. 1, art. 2, s. 9.

(b) 7 B. & C. 639.

(c) 11 A. & E. 792.

(d) 6 Scott N. R. 798.

(e) R. & M. 13.

(f) R. & M. 15.

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in the case of a carrier, the question whether a stamp is necessary does not depend on the value of the goods, but on the amount to be paid for their carriage. This case would have resembled those, if the agreement had been that the one party would pay so much in the pound if the other would get the bill discounted.

PARKE, B.—I think there ought to be no rule. The point turns on the meaning of the Stamp Act, 55 Geo. 3, c. 184, which imposes a duty on every agreement “where the matter thereof shall be of the value of 20*l.* or upwards, whether the same shall be only evidence of a contract or obligatory upon the parties;” and the question is, whether this agreement for the discount of a bill of exchange for 100*l.*, in consideration of which the defendant undertakes to pay 5*l.* a month until it is paid, falls within that clause. Now the agreement does not bind the defendant to pay the 100*l.* secured by the bill, but only to pay 5*l.* a month on an event which might never have happened. In addition to the cases of *Chadwick v. Sills* and *Latham v. Rutley* already referred to, there is the case of *Baldwin v. Alsager* (a), where the memorandum was “Mr. B. has left in the cellar at &c. seventy-two barrels containing ale, which I agree to allow Mr. H. to take from my cellar at any time within three months from this date by receiving one day’s notice; and if left in my cellar beyond that time, Mr. B. or Mr. H., or whom it may concern, to pay rent or warehouse room for the same;” and it was held that, as the rent did not amount to 20*l.*, although the value of the goods exceeded that sum, no stamp was necessary. According to those authorities, the subject matter of the agreement is the thing to be done by the defendant by virtue of the agreement. Here it is to pay 5*l.* a month upon a certain event. It would be inconsistent with

(a) 13 M. & W. 365.

those decisions to hold that this document ought to be stamped.

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PLATT, B.—The subject matter of the agreement is the interest to be paid by the one party to the other.

MARTIN, B.—I am of the same opinion. The cases establish that the subject matter of the contract is the thing to be done by the defendant. Whether right or wrong, the decisions are to that effect. We are then to consider what the defendant really agreed to do; and that was, to pay a monthly sum less than 20*l*.

Rule refused.

STEELE v. WILLIAMS.

May 7.

ACTION for money had and received for the use of the plaintiff.—Plea, never indebted.

At the trial, before the Judge of the Sheriff's Court of London, it appeared that the action was brought by the plaintiff, an attorney, to recover from the defendant, who was the parish clerk of St. Mary, Newington, the sum of 4*l*. 7*s*. 6*d*., paid by the plaintiff's clerk to the defendant, for fees claimed in respect of searches made and extracts taken from the Register Book of Burials and Baptisms in that parish. The plaintiff's clerk applied at the defendant's house, where the registers were kept, for permission to search them. He told the defendant that he did not want certificates, but only to make extracts. The defendant said, the charge would be the same, whether he made

The plaintiff applied to the defendant, a parish clerk, for liberty to search the register-book of burials and baptisms. He told the defendant that he did not want certificates, but only to make extracts. The defendant said the charge would be the same whether he made extracts or had certificates. The plaintiff searched through four

years, and made twenty-five extracts, for which the defendant charged him 3*s*. 6*d*. each; and he accordingly paid the defendant 4*l*. 7*s*. 6*d*.:—*Held*, first, that the charge for extracts was illegal, since the 6 & 7 Will. 4, c. 86, s. 35, only authorises a charge for a search, and for a certified copy; secondly, that the payment was not voluntary, so as to preclude the plaintiff from recovering back the excess; and thirdly, that the defendant was the proper person to be sued.

Per *Platt*, B., and *Martin*, B., when money is paid under an illegal demand, *colore officii*, the payment can never be voluntary.

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extracts or had certificates. The plaintiff's clerk searched through four years, was engaged two hours, and took twenty-five extracts, namely, twelve burials and thirteen baptisms. He inquired of the defendant what was his charge, and the defendant replied 3s. 6d. for each extract, amounting in the whole to 4l. 7s. 6d., which the plaintiff's clerk then paid, and took from the defendant the following receipt:—

“St. Mary, Newington.

“Twenty-five certificates, at 3s. 6d. each . . . 4l. 7s. 6d.

“Received—WM. WILLIAMS, Parish Clerk.

“Nov. 17, 1852.

“Name—Taylor.”

The defendant said, the charge was for the rector, who paid him 1s. 3d. for keeping the books. No mention was made as to the amount of the charge before the search. On the same day the plaintiff sent to the defendant the following letter:—

“Sir,—I have to request that you will forthwith repay me 4l. 7s. 6d., which you have this day compelled my clerk to pay you for his taking extracts from the parish register of St. Mary, Newington, otherwise I shall take proceedings for recovering the same, as you had no right to make the charge. He searched for four years, and I have no objection to your retaining the usual charges for searches, but no more. I request your immediate attention.—I am, &c., “A. R. STEELE”

To the above letter, the defendant returned the following answer:—

“Sir,—I have to acknowledge the receipt of your letter of the 17th instant, relative to the sum of 4l. 7s. 6d. paid by your clerk to me for searches and copies of entries in the register books of this parish; and in answer have to

state, that the searches and copies were made at your clerk's express wish, and that he was not compelled to pay for the same, but voluntarily paid the usual charges for what he obtained. He stated, that he wanted certificates of all entries in the name of Taylor, between 1827 and 1830 inclusive; and when he had searched found that the number of these amounted to twenty-five, of which he made and retained accurate copies, which he might have had certified under the hand of the rector had he wished it; but as solicitors, very frequently, when making extracts from our registers, decline this on account of saving them expense when making affidavits, I was not surprised at his not requiring it. In this instance you may, however, have the extracts certified by the rector, if you wish it; but as your clerk paid only the usual charges for what he required, namely, 1s. for each search, and 2s. 6d. for each certificate, I cannot be fairly asked to return any part of the amount, and must decline to do so.—I am, &c., “WILLIAM WILLIAMS, Parish Clerk.”

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It was submitted, on the part of the defendant, first, that the defendant was not the proper party to be sued, but the action should have been against the rector; secondly, that the claim was not illegal; and thirdly, that the payment was voluntary. It being, however, agreed on both sides, that the question was one of law for the decision of the judge, he decided that the payment was voluntary, and directed a verdict for the defendant, reserving leave for the plaintiff to move to enter a verdict for 4*l.* 7*s.* 6*d.*, or any smaller sum, if the Court should be of opinion that the defendant was the proper party to be sued, that the demand was illegal, and the payment not voluntary.

Willes, in the present Term, obtained a rule nisi accordingly; against which,

Robinson shewed cause.—First, the fees taken by the

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defendant were legal. The 6 & 7 Will. 4, c. 86, s. 35 (a) enables persons to search the register on payment of a certain fee, and to obtain a certified copy on payment of a higher fee; but there is no provision for taking extracts, and if a party is allowed to make them, the law will imply a contract on his part to pay a reasonable sum for that permission. At common law, a parson was under no absolute obligation to furnish copies of a register: *Anonymous* (b). The 6 & 7 Will. 3, c. 6, s. 24, required all persons in holy orders to keep registers, and to allow persons concerned to *view* the same without fee or reward. The 52 Geo. 3, c. 146, for the better regulating and preserving of parish registers, by section 5, requires register books to be kept by the officiating minister for the inspection of persons desirous to make search therein, or to obtain copies from the same, and the 16th section expressly provides, "that all the due legal and accustomed fees" for giving copies shall remain. There is no evidence that the sum demanded was not the legal and accustomed fee; and as the right to search under the 6 & 7 Will. 4, c. 86, does not include a right to take extracts, the defendant was justified in claiming it.—Secondly, the money was paid voluntarily, and with a full knowledge of the law and facts, and therefore cannot be recovered back: Addison on Contracts, p. 76, 3rd ed. If a party be induced to purchase an article by fraudulent misrepresentations of the

(a) Enacts, "That every rector, vicar, or curate, and every registrar, registering officer, and secretary, who shall have the keeping for the time being of any register book of births, deaths, or marriages, shall at all reasonable times allow searches to be made of any register book in his keeping, and shall give a copy, certified under his hand, of any entry

or entries in the same, on payment of the fee hereinafter mentioned (that is to say), for every search extending over a period not more than one year, the sum of one shilling, and sixpence additional for every additional year, and the sum of two shillings and sixpence for every single certificate."

(b) 2 Barnard. 269.

seller respecting it, and after discovering the fraud continue to deal with the article as his own, he cannot recover back the money from the seller: *Campbell v. Fleming* (a). [Martin, B.—The case of *Morgan v. Palmer* (b) shews, that if a person illegally claims a fee *colore officii*, the payment is not voluntary so as to preclude the party from recovering it back.] That case is distinguishable, for there the plaintiff was compelled to pay the fee in order to obtain his license as a publican, here the money was not paid until after the extracts were made. Again, in *Dew v. Parsons* (c), where a sheriff claimed a larger fee than he was by law entitled to, the attorney had paid the money in ignorance of the law. If the plaintiff's clerk had remonstrated against the charge, non constat but it would have been abandoned. [Martin, B.—If a statute prescribes certain fees for certain services, and a party, assuming to act under it, insists upon having more, the payment cannot be said to be voluntary.]—Thirdly, the defendant is not the proper party to be sued. The action should have been brought against the rector, not against the defendant, who is a mere servant of the rector. [Parke, B.—The defendant obtained the money by an improper exercise of his power as parish clerk; that is an illegal act, and therefore he must refund. The rule of law, that if money be paid to a known agent for the use of his principal, the agent cannot be sued for it, only applies to voluntary payments of legal fees, as in *Sadler v. Evans* (d). An action lies against a bailiff who takes an illegal fee, notwithstanding he has paid it over: *Snowdon v. Davis* (e).] There the bailiff, under colour of his warrant, extorted a larger fee than he was entitled to, and therefore was liable to refund the excess. *Rex v. Higgins* (f) is scarcely an

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(a) 1 A. & E. 40.

(b) 2 B. & C. 729.

(c) 2 B. & Ald. 563.

(d) 4 Burr. 1985.

(e) 1 Taunt. 359.

(f) 4 Car. & P. 247.

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authority on the point, since that was the case of an indictment.

Willes appeared to argue in support of the rule, but was not called upon.

PARKE, B.—The judge of the Sheriff's Court decided the matter of law, and left it to us to say whether or not his decision is right. I think that, upon the true construction of the evidence, the payment in this case was not voluntary, because, in effect, the defendant told the plaintiff's clerk, that if he did not pay for certificates when he wanted to make extracts, he should not be permitted to search. The clerk had a perfect right, at all events, to search, and during that time to make himself master, as he best could, of the contents of the books; and the defendant, in whose custody they were, could not, because the clerk wanted to make extracts, insist on his having certificates with the signature of the minister. For one shilling he would be entitled to look at all the names in a particular year. He would have no right to remain an unreasonable time looking at the book, nor probably to require the parish clerk to put it in his hands, for it is the duty of the latter to superintend the search, and keep a control over the book. But if a person insists upon himself taking a copy, that is a different matter; the statute only provides for a certificate with the name of the minister, and for that he must pay an additional fee. It was, therefore, an illegal act on the part of the defendant to insist that the plaintiff should pay 3s. 6d. for each entry of which he might choose to make an extract. I also think that the defendant is the proper party to be sued. The doctrine laid down in *Sadler v. Evans* only applies to the legal receipt of fees. But the case of *Snowdon v. Davis* shews, that if a person acting for another insists on the payment of money on an illegal ground, he is the party

to be sued for it. Therefore, in the first place, I think that there is evidence that this payment was not voluntary, but necessary for the exercise of a legal right; and further, I by no means pledge myself to say that the defendant would not have been guilty of extortion in insisting upon it, even without that species of duress, viz. the refusal to allow the party to exercise his legal right, but *colore officii*. *Dew v. Parsons* certainly goes to that extent. But it is not necessary to decide this case on that ground. The rule will, therefore, be absolute to enter a verdict for the plaintiff for the sum of 3*l.* 14*s.* 6*d.*

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PLATT, B.—I am also of opinion that the verdict ought to be entered for the plaintiff. Under the 6 & 7 Will. 4, c. 86, s. 35, there are only two things in respect of which the incumbent is entitled to fees, namely, for a search and for a certified copy of the register. A fee of 1*s.* is allowed for a search throughout the whole period of the first year, and 1*s.* 6*d.* for every additional year. Those are all the fees demandable in respect of a search. With regard to taking extracts, no fee is mentioned, and the incumbent has no right to tax any one for so doing. But, inasmuch as before the search began the defendant told the plaintiff's clerk that the charge would be the same whether he made extracts or had certified copies, and under that pressure the extracts were obtained, and it would have been most dishonourable for the party, after having got the extracts, to refuse to pay, the money so obtained may be recovered back. The defendant took it at his peril; he was a public officer, and ought to have been careful that the sum demanded did not exceed the legal fee. As to the defendant being the proper person to be sued, it is almost useless to make any observation. He was not justified in taking the money, and is responsible for his own illegal act.

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MARTIN, B.—I am entirely of the same opinion. The judge of the Sheriff's Court considered the particular question, whether or not this was a voluntary payment, and decided that it was; but he goes on to state, that if this Court shall be of opinion that the defendant was the proper party to be sued, and that the demand was illegal and the payment not voluntary, we are to give judgment accordingly. I am clearly of opinion that the defendant is the right person to be sued, though he acted on behalf of another, who was the officer appointed under the Act of Parliament. Any person who illegally takes money under colour of an Act of Parliament is liable to be sued for it, though the money is not to go into his own pocket. It is different from a payment of money to an agent for the purpose of being paid over to the principal, for there the payment is voluntary. Here the money was paid by virtue of the office of the rector. Mr. *Robinson* has argued, that because the Act of Parliament allows a fee for a search and for a certified copy, but no fee is mentioned for taking an extract, it is competent for the parish clerk to demand for it any fee he pleases. I am clearly of opinion that he is not. If a person is authorised to receive money by virtue of an Act of Parliament, it is like a contract between the parties, that the sum allowed shall be *all* which he is to receive, and he is as much bound by the entirety of what he is authorised to take as he would be by the entirety of a sum in a contract. The defendant was entitled to be paid for a search and for a certified copy, but there was no intermediate payment. As to whether the payment was voluntary, that has in truth nothing to do with the case. It is the duty of a person to whom an Act of Parliament gives fees, to receive what is allowed, and nothing more. This is more like the case of money paid without consideration—to call it a voluntary payment is an abuse of language. If a person who was occupied a considerable

time in a search gave an additional fee to the parish clerk, saying, "I wish to make you some compensation for your time," that would be a voluntary payment. But where a party says, "I charge you such a sum by virtue of an Act of Parliament," it matters not whether the money is paid before or after the service rendered; if he is not entitled to claim it, the money may be recovered back (*a*).

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Rule absolute to enter a verdict for the plaintiff for 3*l*. 14*s*. 6*d*.

(*b*) The 14 & 15 Vict. c. 99, s. 14, enacts, that "Whenever any book or any other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents proveable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law, or by consent of parties, authority to hear, receive, and examine evidence,

provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted, and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words." See *In re Hall's Estate*, cor. Lords Justices, 22 L. J. 177.

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*April 18.*BUCKMASTER *v.* MEIKLEJOHN.

To a declaration on the common counts, the defendant pleaded a set off, and delivered particulars of his set-off with the plea. He afterwards withdrew this plea, and pleaded *puis darrein continuance* that there had been a controversy between the plaintiff and himself about other matters in addition to those in the cause, that a balance of accounts had been struck between the parties, that the plaintiff admitted the set-off pleaded to be due, and that it was agreed that the balance then struck should be paid by instalments, &c.; and that it was further agreed that the defendant should release the plaintiff from all liability on a certain contract, &c.; and that this agreement was accepted by the plaintiff in satisfaction of his cause of action. The plaintiff replied that he had been induced to enter into this agreement by fraud:—*Held*, that the particulars of set-off, delivered with the original plea of set-off, and in which particulars the statement of accounts differed from the statement upon which the agreement was founded, were admissible in evidence for the purpose of explaining the plea.

THIS was an action of debt. The declaration contained the common counts.

The defendant pleaded *puis darrein continuance*, that “to wit, on &c., there were controversies between the plaintiff and the defendant, not only respecting the said several matters in this cause which were disputed by the defendant, but also in and about a certain contract for the purchase of a certain cottage in the agreement hereinafter mentioned contained; and thereupon heretofore, to wit, on the 12th of July, 1852, it was agreed by and between the plaintiff and the defendant, by a certain agreement in writing, then respectively signed by them in the words and figures following, viz.—‘Memorandum of agreement made this 12th of July, 1852, between Joseph Buckmaster, of Windsor, in the county of Berks, gentleman, of the one part, and James Meiklejohn, of the Batchellor’s Arms, New Windsor aforesaid, licensed victualler, of the other part: Whereas the said J. Buckmaster, in the month of May last, commenced an action in her Majesty’s Court of Exchequer of Pleas against the said J. Meiklejohn, to recover the sum of 290*l.* or thereabouts, to which action the said J. Meiklejohn pleaded a set-off to a large amount; and whereas the said J. Buckmaster hereby admits the set-off, so pleaded as aforesaid, as well as other sums, to be due to the said J. Meiklejohn for money expended by the said J. Meiklejohn in and about the erection of a certain cottage at Winkfield for him the said J. Buckmaster; and whereas the said J. Buckmaster is desirous of abandoning his

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contract for the purchase of the piece of land on which such cottage has been so built, and also to give up all right and title to the said cottage so built for him as aforesaid; and hath requested the said J. Meiklejohn to take the same upon himself, and to discharge the said J. Buckmaster from all claim, debt, or liability in respect thereof; which he hath agreed to do. Now, it is hereby agreed between the said parties hereto, that the said action shall be abandoned, and all further proceedings discontinued, and that each of the said parties shall pay his own costs with reference thereto; and that, inasmuch as the said J. Meiklejohn doth hereby release the said J. Buckmaster from all claim or liability in respect of the said land and cottage, there will now be a balance of 158*l.* 1*s.* 10*d.* due from him to the said J. Buckmaster, which he the said J. Meiklejohn doth hereby acknowledge and admit; and which sum the said J. Buckmaster agrees to receive by the following instalments, viz. the sum of 25*l.* at the time of the signing of this agreement, the further sum of 25*l.* on the 1st of November next, and the like sum of 25*l.* on the 1st day of the months of February, May, August, and November in the year 1853, and the balance of the said sum of 158*l.* 1*s.* 10*d.* on the 1st of February, 1854; but it is distinctly understood and agreed between the said parties, that the present agreement is not to be construed into an admission that there was anything due from the said J. Meiklejohn to the said J. Buckmaster upon the action so brought as aforesaid; and that such balance is only occasioned by the said J. Meiklejohn having taken upon himself the land and house which was to have been the property of the said J. Buckmaster: And it is finally agreed between the said parties, that this present agreement is a settlement of all accounts between the said parties up to the present time, and may be given in evidence as a bar to any action or proceeding by either of the said parties against the other of them, save and except the sums here-

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inbefore mentioned and agreed to be paid by the said J. Meiklejohn to the said J. Buckmaster. As witness" &c. The plea then proceeded to state that the defendant, at the time of signing the agreement, paid the plaintiff the sum of 23*l*. first within mentioned; and that the defendant entered into the said agreement, and paid the said sum in manner aforesaid, in full satisfaction and discharge of the causes of action in the declaration mentioned; and the plaintiff then accepted such agreement in such full satisfaction and discharge.

To this plea the plaintiff replied, that he was induced to enter and did enter into the said agreement by the fraud and misrepresentation of the defendant.

At the trial, before *Williams, J.*, at the last Berkshire Assizes, the agreement and settlement of accounts, upon which the plea was founded, was produced. It however appeared, that the transactions took place at the office of the defendant's attorney, in the presence of the plaintiff and the defendant and of their wives, but in the absence of the plaintiff's attorney. It further appeared, that the defendant had, in the first instance, pleaded the general issue and a plea of set-off to the present action; but that he had withdrawn these pleas shortly before the commission day for the Summer Assizes of 1852, for which notice of trial had been originally given; and that he had then pleaded the above plea puis darrein continuance. The plaintiff's counsel, for the purpose of shewing that the transaction upon which the plea was founded was a fraud upon the plaintiff, tendered in evidence the particulars of set-off, which had been delivered with the plea of set-off; by which it appeared, that a certain item, which was placed therein to the plaintiff's credit, had been placed to his debit in the statement of the accounts by which the balance agreed to be paid was ascertained, when the arrangement on the 12th of July had been come to. The defendant's counsel objected to the reception of this evidence; but the learned Judge admitted it. The plaintiff obtained a verdict for 160*l*.

Allen, Serjt., now moved for a rule nisi for a new trial, on the ground that this evidence had been improperly admitted.—The particulars of set-off were not admissible. They formed no part of the record, the plea of set-off having been removed from the record; and even if that plea had been left, these particulars ought not to have been admitted. In *Burkitt v. Blanshard* (a), it was held that the plaintiff was not entitled to use the defendant's particulars of set-off, for the purpose of taking an item out of the Statute of Limitations. [*Alderson*, B.—The plaintiff offered these particulars in evidence with a view to shew that the statement in the inducement of this plea, that the account was correct, was in fact false. That was some evidence for the jury, by which they might or might not believe that the plaintiff was induced to enter into the arrangement by the fraud of the defendant.] The particulars of set-off cannot be used as an admission of an item of the plaintiff's demand, so as to dispense with the necessity of the plaintiff's proving it: *Miller v. Johnson* (b), *Harington v. Macmorris* (c).

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PARKE, B.—This was clearly legitimate evidence as a key to and for the purpose of explaining the plea. In point of law, pleadings are not admissions, but are merely the statement of the case, which the party wishes to raise for the opinion of the jury. This was fully explained in *Boileau v. Rutlin* (d), where this question underwent much consideration. This evidence was admissible simply on the ground that it went in explanation of the plea. Upon this point, therefore, there ought to be no rule.

ALDERSON, B., and MARTIN, B., concurred.

Rule refused.

(a) 3 Exch. 89.

(b) 2 Esp. 602.

(c) 5 Taunt. 228.

(d) 2 Exch. 665.

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April 25.

MEEUS v. THELLUSSON.

To an action on a judgment recovered in Belgium in the year 1843, the defendant pleaded that he was not at any time resident or domiciled within the jurisdiction of the Court wherein the judgment was recovered; nor was he a native of Belgium; and that he was not, at any time before the recovery of the said judgment, served with any process or summons; nor did he appear in the action; nor had he, at any time before the said recovery, any notice of or any means of defending himself from the said action. Replication, that the judgment was founded upon a bill of exchange, drawn in Belgium, according to the laws in force in that country,

THIS was an action brought by the plaintiff, as the governor of a certain Belgian Society, called "The Society General for encouraging the National Industry, established at Brussels," upon a judgment recovered against the defendant in the Court of the Tribunal of Commerce at Brussels, to wit, on the 27th of July, 1843.

The defendant pleaded, fifthly, that the said action, to wit, in the Tribunal of Commerce, in the declaration mentioned, was an action commenced according to the laws then and still in force in the said kingdom of Belgium, by process or summons; and that the defendant was not, at the time of the commencement thereof, or at any time afterwards, up to and after the time of the recovery of the said judgment, resident or domiciled within the jurisdiction of the said court, to wit, the said Tribunal of Commerce, nor had he during all that time, or any part thereof, any property there, nor is nor was he a native of Belgium; and that he was not, at any time before the recovery of the said judgment, served with any process or summons in the said action, nor did he appear to or in the said action, nor had he, at any time before the recovery of the said judgment, any notice or knowledge of any process or summons, or of any proceeding in the said action, or any means or opportunity of defending himself therein or therefrom.

and accepted by the defendant, payable at the house of one M. de W., at Bruges, in Belgium; and that, at the time of the acceptance, the defendant resided in Belgium, at the said house, which was the defendant's last domicile and residence there; and that, by the law of Belgium, where a bill is accepted, payable at a particular place, such place may, for all purposes, and in all actions relating to such bill, be deemed the elected domicile of such acceptor; and further, that the summons by which the action was commenced was duly served upon the defendant at the above-mentioned house; and that, by the law of Belgium, such service is good and sufficient to give the court jurisdiction; and that the issuing of the process, the service of the summons, and the proceedings in the action were in accordance with the law of Belgium; and, according to such law, the judgment is valid and binding on the defendant:—*Held*, on demurrer, that the replication was bad, for not stating what the law of Belgium was at the time of the acceptance of the bill of exchange.

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Replication, that the said judgment in the declaration mentioned was founded upon the following cause of action, viz. a bill of exchange, drawn in the kingdom of Belgium, according to the laws in force in the said kingdom, by one Augustin Malech de Werthenfels, and directed to the defendant, and whereby the defendant was directed to pay the sum of 22,800 francs to the order of the said drawer, and which said bill was in the said kingdom of Belgium, and according to the laws there in force, accepted by the defendant, and made payable by him at a certain place in the said kingdom, to wit, at the house of Mr. Van Wymelbeke Vercanteren, at Bruges, in the said kingdom. And the said bill was duly indorsed to the said society, and was not paid. And the plaintiff says, that the defendant, at the time of his accepting the said bill, resided in the said kingdom of Belgium, to wit, at the said house of Mr. Van Wymelbeke Vercanteren, and such house was the last domicile and residence of the defendant in Belgium. And the plaintiff says that, by the law of Belgium, where a bill is accepted payable at a particular place, such place may for all purposes, and in all actions relating to such bill, be deemed the elected domicile of such acceptor. And the plaintiff says, that the said process or summons in the fifth plea mentioned, by which the said action was commenced, was duly served upon the defendant at the said above-mentioned house and place where the said bill was payable, the same being such residence and domicile of the defendant as aforesaid, by leaving and delivering the same at such house for him. And the plaintiff says, that by the law of Belgium, and the practice of the said Court in which the said judgment was pronounced, in an action against the acceptor of a bill of exchange made payable at a particular place, leaving and delivering the process or summons by which such action is commenced at such place, or at the last residence or domicile of such acceptor, is good service of such process or summons, in

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order to found the jurisdiction of such Court, and to enable it to pronounce a valid judgment in such action. And the plaintiff says, that the issuing of the said process or summons in the said court, and the summoning of the defendant, and the proceedings in the said action, were in all things in accordance with the law of Belgium and the practice of the said court, and according to such law and practice the said judgment is good, valid, and binding upon the defendant and the said society.

Demurrer, and joinder.

Willes in support of the demurrer.—The replication is open to the substantial objection, that it does not state what the law of Belgium was at the time of the alleged acceptance of the bill of exchange, upon which the foreign judgment is professed to have been founded. That judgment appears by the pleadings to have been recovered nearly ten years ago, and there is no presumption that the law of that country has continued unaltered.

Montague Smith contra.—The objection is one of form, and is open on special demurrer only. [*Parke*, B.—It appears to me to be one of substance. *Pollock*, C. B.—I am inclined to think that the pleadings sufficiently state, in substance, that the law was the same at the time of acceptance as it is now. *Parke*, B.—I should rather draw the conclusion, that the pleader had not ventured to state that fact positively; and unless the fact be so, the replication cannot be supported.]

Montague Smith then applied to amend instantan under the 222nd section of the Common Law Procedure Act; but to this *Willes* objected.

PER CURIAM (a).—The plaintiff may amend his pleadings

(a) *Pollock*, C. B., *Parke*, B., and *Martin*, B.

upon the usual terms, viz. upon payment of costs; and he may intimate to the Court, upon the next special paper day, whether he will elect to do so; otherwise there must be

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Judgment for the defendant (a).

(a) The plaintiff's counsel, on the day fixed, elected to amend.

BAGGE, Appellant; MAWBY, Respondent.

May 7.

THIS was an appeal by the plaintiff against the decision of the judge of the county court of Norfolk, held at King's Lynn.

The action was brought to recover the sum of 29*l.* 9*s.*, under the following particulars of demand:—"To half-a-year's rent due to me up to Michaelmas-day, in respect of a mill, and land and premises at Gaywood, late in the occupation of Robert Atmore, a bankrupt, 28*l.*; to cash paid rent-charge 1*l.* 9*s.*; making 29*l.* 9*s.*"

At the trial, it appeared that Robert Atmore, mentioned in the particulars, on the 5th of April, 1847, became tenant from year to year to Bagge, the appellant, (the tenancy being subject to determination at the end of any year by a six months' notice to the appellant,) of a mill, cottage, and about ten acres of land, at the yearly rent of 50*l.*, payable on the 5th of July, the 18th of October, the 5th of January, and the 5th of April in each year, under a written agreement dated the 23rd of March, 1847. Atmore continued in the occupation of the premises as tenant to the appellant, from the time of entering into the agreement till the 6th of August, 1852, when he clandestinely

Half-a-year's rent being due and in arrear from a tenant who had previously committed an act of bankruptcy, the landlord put in a distress, and was about to proceed with the sale of the goods seized, when, in consequence of a notice from a creditor of the tenant, stating that he was taking proceedings in bankruptcy against the tenant, and that he thereby warned the landlord not to sell, and threatened to hold him accountable if he did, the landlord withdrew the distress without obtaining payment of his rent. At that time no

assignee had been appointed; but the tenant was afterwards declared bankrupt, and the creditor who gave the above notice was made assignee. The landlord subsequently distrained a second time for the same rent, but the goods were sold under the direction of the assignee, and the proceeds of the sale were paid over to him:—*Held*, that, as the landlord had abandoned the first distress without any sufficient excuse for so doing, the second distress was illegal, and that he could not maintain an action against the assignee to recover the proceeds of the goods.

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tinely quitted the occupation of the premises, and fled from England, and thereby committed an act of bankruptcy. No notice had been given to determine the tenancy. At the time of his departure Atmore had a servant of the name of Crisp, who lived on a part of the demised premises; and about the 9th of August, 1852, the appellant, hearing of his tenant's flight, proceeded to the premises, where he was told by Crisp that Atmore had said to him that he should return shortly; upon which the appellant desired Crisp not to allow any one to go upon the premises. After this, the appellant finding that there was no chance of Atmore's return, caused substantial repairs to be made to the premises, and let them to one Frost, as tenant from year to year, from the 13th of October, 1852, on the condition of his giving them up upon any claim being made to them by Atmore, or by any one claiming under him. The respondent, as assignee under a fiat in bankruptcy, subsequently issued against Atmore, let the eddish of the land to Frost. All the rent was paid up to Lady-day, 1852. The appellant, previously to the 13th of October, had paid the sum of 1*l*. 9*s*. for tithe rent-charge in respect of the premises. For the sum of 28*l*., being the amount of half-a-year's rent up to the 11th of October, the appellant on the 12th of October, 1852, distrained certain goods and chattels then being upon the premises, and kept possession of the distress until the 18th of October, when the goods and chattels distrained were advertised for sale, and were then about to be sold by auction. A notice in writing signed by the respondent was served upon the auctioneer, which was communicated by him to the appellant.

The notice was as follows:—

“The Bankrupt Law Consolidation Act, 1849.

“In the Court of Bankruptcy.

“In the Matter of Robert Atmore, late of Gaywood, in the county of Norfolk, miller.

“Take notice, that a petition for adjudication of bank-

ruptcy was, on the 16th of October instant, filed in the Court of Bankruptcy, London, against the above-named Robert Atmore, by me, the undersigned Thomas Mawby, of Gaywood, in the county of Norfolk, farmer, one of the creditors of the said Robert Atmore (the said Robert Atmore having, in the month of August last, absconded from his creditors); and that it is the intention of me, the said Thomas Mawby, forthwith to proceed in the matter of the said petition. This is therefore to require you not to sell or otherwise dispose of the goods, chattels, and effects now being in or about the premises lately in the occupation of the said Robert Atmore, at Gaywood aforesaid, or any of them, and which goods, chattels, and effects are advertised for sale by you this day, and are now, or lately were, the property or in the possession of the said Robert Atmore. And take further notice, that, in the event of your selling or otherwise disposing of the said goods, chattels, and effects, or any portion thereof, you will be held accountable for such your wrongful act.

"Dated this 18th of October, 1852,

"THOMAS MAWBY,

"Petitioning creditor."

The appellant, in consequence of having received the above notice, and in pursuance thereof, and for no other reason whatever, gave up the possession of the goods and chattels which he had so distrained, and did not sell them; and the arrears of rent and tithe-rent charge were not, in fact, paid or satisfied by the said distress. On the 23rd of October, 1852, Atmore was duly declared a bankrupt, upon a petition for adjudication of the bankruptcy, presented by the respondent on the 16th of October; and on the 10th of November following, the respondent was appointed the creditors' assignee of his estate and effects; and the messenger of the Court of Bankruptcy took possession of the goods and chattels of Atmore, then being

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upon the premises in question. On the 16th of November, the respondent verbally promised the appellant that the said arrears of rent and tithe-rent charge should be paid on the day after Atmore's goods and chattels should be sold. On the same day, the above-mentioned sums of 28*l*. and 1*l*. 9*s*. being still unpaid to the appellant, in order to secure the payment of them, the appellant again seized and distrained all the goods and chattels which were then on the premises, for the rent and tithe-rent charge so due and in arrear, of which the respondent had notice on the same day. On the 17th of November, the goods and chattels so seized and distrained by the appellant as last mentioned, were advertised and about to be sold by auction by the authority of the respondent; whereupon, and before any sale thereof, and whilst the appellant still had possession of the said goods and chattels, a notice was served upon the auctioneer that half-a-year's rent, up to the preceding Michaelmas, was then due and owing to the appellant. The auctioneer however, notwithstanding this notice, and by the order of the respondent, sold the whole of the goods and chattels, and paid over the proceeds to the respondent. The appellant had never received his half-year's rent, or the amount of the rent-charge.

Upon the preceding facts the appellant contended that he was entitled to judgment, upon the following grounds:—

First, that the second distress, made on the 16th of November, 1852, was a legal distress, and available for the said arrear of rent to the appellant (the same being less than a year's rent) (*a*); and that the respondent, having caused the goods and chattels then distrained and in the possession of the appellant to be sold, and having received the proceeds of such sale after he had notice of such second distress and of the appellant's claim for rent,

(*a*) See the 12 & 13 Vict. c. 106, s. 129.

was legally liable to pay the appellant the amount so due to him for rent.

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Secondly, that the respondent was liable to pay the said sums so due to the appellant for rent and tithe-rent charge, by virtue of his promise to the appellant on the 16th of November, 1852. And thirdly, that, under the Bankrupt Act, the appellant was entitled to recover the amount.

The judge decided, first, that the second distress, made on the 16th day of November, 1852, was illegal; and that therefore the appellant was not entitled to recover upon the first ground. Secondly, that the respondent's promise of the 16th of November, 1852, not being in writing, was not binding upon the respondent, and he accordingly gave judgment in the respondent's favour. The Judge did not notice the third point urged on behalf of the appellant.

The judge also held, that there was no eviction of Atmore by the appellant from the premises.

The question for the opinion of the Court was, whether, under the above statement of facts, the appellant was entitled to recover from the respondent the said sums of 28*l.* and 1*l.* 9*s.*, or either of them. If the Court should be of opinion that he was so entitled, the judgment was to be entered for the appellant accordingly; otherwise the judgment of the Court below was to be affirmed.

The appeal was argued in the present Term (May 4) by

Worlledge for the appellant, the plaintiff in the action. The main question is, whether the second distress was legal. It is submitted that, under the circumstances set forth, it was. It appears that the appellant, in consequence of the notice given to him by the respondent, and "for no other reason whatever," gave up possession of the goods first distrained. It may be conceded, that where a landlord, of his own free will, and without any notice or request to do so by the tenant, abandons a distress, he

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cannot distrain again for the same rent, and that such an abandonment precludes him from a second distress, upon the principle, that the proceeding is vexatious, and harasses the tenant. But where there has been no abandonment of the distress, and the rent has not been satisfied, the landlord may distrain for the rent in arrear. In *Lear v. Edmonds* (a), which was an action for use and occupation, the defendant pleaded that the plaintiff took and detained as a distress goods of value sufficient to satisfy the same, and it was held that the plea was bad for not shewing that the rent was satisfied; and *Abbott, J.*, said, "If the goods had been relinquished at the request of the party, then the distress would not operate as a bar." Here the giving up of the possession of the goods was solely in consequence of the notice, which was equivalent to a request by the respondent to the landlord that he would do so. *Lingham v. Warren* (b) was decided upon the authority of *Lear v. Edmonds*. In that case a plea in bar to an avowry for rent was held insufficient, on the ground that it did not aver that the rent was satisfied by the distress. These cases were followed by *Hudd v. Ravenor* (c), where a similar plea was held bad. That was also an action of replevin. It is therefore submitted, that where the landlord, either by the false representation of or by any other means adopted by his tenant, gives up possession of a distress, he may distrain again for the same rent. [*Pollock, C. B.*—*Lear v. Edmonds* was an action for use and occupation, and the plea, which stated that a distress had been made for the rent claimed in the action, did not aver that the distress was sufficient to satisfy the rent; and the plea was therefore bad for not containing such an averment. *Dallas, C. J.*, in *Lingham v. Warren*, appears to put the actions for use and occupation and of replevin upon the same foot-

(a) 1 B. & Ald. 157.

(b) 2 B. & B. 36.

(c) 2 B. & B. 662.

ing. *Parke, B.*—In *Hutchins v. Chambers* (a), Lord Mansfield, C.J., appears to rest the case where a second distress is allowable upon the right principle. He there says, “Now, a man who has an entire duty shall not split the entire sum, and distrain for part of it at one time, and for other part of it at another time, and so toties quoties for several times, for that is great oppression; and that is the case of *Wallis v. Savill* (b), where the second distress was holden unjustifiable, because both distresses were taken for one and the same rent; and it was the lessor’s folly that he had not taken a sufficient distress at first. But if a man seizes for the whole of the sum that is due to him, and only *mistakes* the value of the goods seized (which may be of very uncertain, or even imaginary value, as pictures, &c.), there is no reason why he should not afterwards complete his execution by making a further seizure. And if he does not take the value of the whole at first (out of tenderness and moderation, perhaps), there is no reason why he should not complete it by a second seizure, provided it be for the same sum due.”] In the later case of *Dawson v. Cross* (c), the Court of Common Pleas does not impugn the authority of *Lingham v. Warren* and *Hudd v. Ravenor*, although express reference is made to them in the judgment of the Court. Here the landlord did not abandon the distress wantonly, and without any probable cause. [*Parke, B.*—The request to give up the goods, if the notice can be considered in that light, was not made by the tenant but by a stranger; and the landlord, being frightened by an idle threat, abandoned the distress; and the simple question is, can he distrain again?] The party who makes the threat ought not to be permitted to turn round in an action against him by the landlord, and to avail himself of it. [*Parke, B.*—The appellant has several difficulties to contend against. Even upon the supposi-

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(a) 1 Burr. 579.

(b) 2 Lutw. 1532.

(c) 1 C. B. 961.

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tion that the second distress was legal, has the appellant so shaped his claim as to make it applicable to the present state of facts? He could not recover as for money had and received—the goods were in the custody of the law, and the money was not his; neither could the claim be supported upon the ground of a promise made by the respondent to pay the debt of another, as there was no note in writing to satisfy the Statute of Frauds. The true nature of the appellant's claim is for pound-breach, viz. that the respondent broke the pound which the appellant had made on the premises; for if the second distress was lawful, the auctioneer had no right to sell the goods by order of the assignee.] No objection was taken to the form of the particulars upon the trial of the plaint; and if there had been, an amendment might have been made.

Cleasby appeared to argue for the respondent; but the Court intimated that they were clearly of opinion that the second distress was illegal: they would, however, take time before giving judgment, for the purpose of considering the several authorities which had been cited.

Cur. adv. vult.

PARKE, B., now said (after stating the case):—We are of opinion, in the first place, that if we look to the form of the case, the plaintiff has not shaped the particulars of his claim as he ought to have done, for the claim was not for rent, nor even for money had and received, but in reality for pound-breach. But without resting our judgment upon that ground, for we are unwilling to hold the parties strictly to matters of form in proceedings in the County Court, we are of opinion that, on the merits, the learned judge decided the case rightly. The question is, whether the second distress, which was made on the 16th of November, was a lawful distress. There is nothing more clear than this, that a person cannot distrain twice for the

same rent; for if he has had an opportunity of levying the amount of the first distress, it is vexatious in him to levy the second, unless there be some legal ground for his adopting such a course, as, for example, in the instance put by Lord *Mansfield*, C. J., in the case referred to on the argument, *Hutchins v. Chambers* (a). If there has been some mistake as to the value of the goods, and the landlord fairly supposed the distress to be of the proper value at the time of levying the first distress, and he afterwards finds it to be insufficient, he may then distrain for the remainder; or if the tenant has done anything equivalent to saying, "forbear to distrain now, and postpone your distress to some other time." In such cases the landlord may distrain a second time. But if there is a fair opportunity, and there is no lawful or legal cause why he should not work out the payment of the rent by reason of the first distress, his duty is to work it out by the first distress, and he cannot distrain again. The question in such case is not whether he could maintain an action for use and occupation. One of the cases cited is applicable to that form of proceeding, as an authority that a levy by distress is not a good answer to that form of action, unless it be also shewn that the distress satisfied the rent. The principle upon which, as a general rule, a landlord cannot distrain twice is, that he must not vex his tenant by the exercise upon two occasions of this summary remedy. The question, therefore, in this case comes simply to this, whether the notice that was given by the respondent (who was merely the petitioning creditor, and had no other interest whatever in the property,) to the landlord, to desist from selling on the first distress, was a good cause or excuse for his abstaining from exercising the power of distress. We are all of opinion that it was not, and that it was a mere idle threat which he might and indeed ought

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(a) 1 Burr. 579.

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to have disregarded. It cannot be said that the first distress was abandoned by the act of the tenant, for at the time the respondent gave the notice he had no interest whatever in the subject-matter, since at that time he had not been appointed assignee. We consider the notice as a mere idle threat from a stranger, who had no right to interfere with the distress, and that the landlord ought to have proceeded with that distress. If he had done so he would have worked out the payment of the debt, therefore he had no right to distrain again; and consequently we are of opinion, that the learned judge was right in deciding that the second distress was illegal.

I may add, that we think that the learned judge was also right in his judgment on the second point; first, because this, being clearly the debt of another person, would by law require a note in writing; secondly, if there had been such a note in writing, it would not have been sufficient, as it would not have contained a good consideration. We are therefore of opinion, that the appeal must be dismissed, and that the judgment of the County Court should be affirmed with costs.

Judgment affirmed, with costs.

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May 9.

IN this case *Alderson*, B., had made an order, dismissing a summons, calling on the defendant to shew cause why the plaintiffs should not recover their costs of the cause. In the present Term,

Milward had obtained a rule, calling on the defendant to shew cause why this order should not be rescinded, and why the Master should not be at liberty to tax the plaintiffs' costs. It appeared by the affidavits, that the action was brought by the plaintiffs against the defendant, for the breach of a contract made at sea. The plaintiffs and the defendant both resided at Liverpool; and the plaintiffs, who were the owners of a steam-tug, had agreed with the defendant to tow his vessel into Liverpool. The defendant had cast off the tow rope, and had prevented the plaintiffs from performing the contract. The cause was tried at the Passage Court of Liverpool, on the 26th of February, 1852, when the plaintiffs obtained a verdict for 2*l.*, which they afterwards accepted. At the time of the trial, and up to the time of the taking out of the summons, the defendant was abroad. On the 26th of January, 1853, the summons was taken out before *Alderson*, B., at Chambers, for an order to tax the plaintiffs' costs, under 15 & 16 Vict. c. 54, s. 4(a),

A cause was tried in one of the superior Courts in February, 1852, and the plaintiff obtained a verdict, and accepted the damages awarded. In February, 1853, the plaintiff applied for an order for costs under the 15 & 16 Vict. c. 54, s. 4. The defendant had been in the interim absent abroad:—*Held*, that the application for costs was in time.

(a) "The 13th section of the 13 & 14 Vict. c. 61, is hereby repealed; and in any action in which the plaintiff shall not be entitled to recover his costs by reason of the provisions of the 11th section of such Act, whether there be a verdict in such action or not, if the plaintiff shall make it appear to the satisfaction of the Court in which such action was brought, or to the satisfaction of a Judge

at Chambers, upon summons, that such action was brought for a cause in which concurrent jurisdiction is given to the superior Courts by the 128th section of the 9 & 10 Vict. c. 95, or for which no plaint could have been entered in any such county courts, or that such action was removed from a county court by certiorari, or that there was sufficient reason for bringing such action

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which summons was opposed, and an extract of the case of *Orchard v. Mossy* was referred to in a legal publication, as being a decision against the application; and the learned Judge, thinking that he was bound by that decision, on the 2nd of February dismissed the summons.

Edward James shewed cause (May 6).—The question is, whether a plaintiff, who seeks for an order to tax his costs under the 15 & 16 Vict. c. 54, s. 4, is bound to make the application within a reasonable time after the verdict has been delivered, or whether he may make the application at any time. Here the plaintiffs have allowed a period of nearly a twelvemonth to elapse, without any sufficient excuse for his delay. The legislature could not have intended to give a plaintiff the liberty of withholding the application for an indefinite time. Much inconvenience might arise from such delay. *Orchard v. Mossy* (a) is a decisive authority, that the plaintiff is too late in the present case. There an order was made by a Judge at Chambers, on the 26th of May, dismissing a summons by the plaintiff for costs under the 13th section of the 13 & 14 Vict. c. 61, the Court of Exchequer having decided in *Jones v. Harrison* (b), that that section was permissive, and not imperative. In Michaelmas Vacation, the Court of Common Pleas decided in *Macdougall v. Paterson* (c), that the section was imperative, and that was followed in *Crake v. Powell* (d). The Court of Queen's Bench held, that an application to the Court for costs in Hilary Term, 1852, was too late. Lord *Campbell*, C. J., there said, "The

in the Court in which such action was brought, then and in any of such cases the Court in which such action is brought, or the said Judge at Chambers, shall thereupon, by rule or order, direct that the plaintiff shall recover his costs, and thereupon the plaintiff shall have the same

judgment to recover his costs that he would have had if the before-mentioned Act of the 13 & 14 Vict. c. 61, had not been passed."

(a) 16 Jur. 124.

(b) 6 Exch. 328.

(c) 11 C. B. 755.

(d) 2 E. & B. 210.

plaintiff accepted damages, reserving, as he might do, his right to make an application to this Court for his costs; but he must make that application within a reasonable time. The plaintiff merely, on account of a different decision in the Court of Common Pleas from that which had been given in the Court of Exchequer, asks us substantially to reverse the judgment of the Judge at Chambers. Very inconvenient consequences would follow, if we allowed this application, because it might be made at any distance of time, when the defendant might be no longer of ability to pay the costs." [Pollock, C. B.—We must read the judgment of the Lord Chief Justice in connection with the facts of the case, and I think that he merely means that where a party appeals from the decision of a Judge at Chambers, he must come to the Court promptly; for *Cole-ridge*, J., rests his judgment entirely upon that ground. The defendant has not been prejudiced by the plaintiffs' delay.]—He also contended that the contract was broken on the arrival of the defendant's vessel at Liverpool, and therefore that the case was not one of concurrent jurisdiction. The Court, however, were clearly of opinion that the breach of contract was effected at sea by the refusal of the defendant to allow the plaintiffs to tow his vessel under the contract.

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Milward appeared to support the rule, but was stopped by the Court; who intimated that they would hear him on some future occasion, if they should think it necessary.—He referred to *Morris v. Bosworth* (a), which was then before the Court of Queen's Bench, and to *Asplin v. Blackman* (b).

Cur. adv. vult.

PARKE, B.—In this case the question was, whether my Brother *Alderson* ought to have allowed the plaintiffs'

(a) Decided May 9, 2 E. & B. 213.

(b) 7 Exch. 386.

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costs a considerable time after the cause had been tried. The trial took place in February, 1852, and the application was not made till January, 1853, that is to say, not until almost a year had elapsed. It appeared, that the defendant had, during the interval, been in Australia. It was a case in which the superior Courts had concurrent jurisdiction with the County Court; for, although both parties resided within the jurisdiction of the County Court at Liverpool, still the cause of action occurred at sea, and consequently out of the jurisdiction of the County Court. It is clearly, therefore, a case in which the plaintiff was entitled to his costs, under the clause in the County Court Act relating to concurrent jurisdiction; and if the Judge was satisfied there was concurrent jurisdiction, he was bound to make the order for costs; but the application was resisted, on the ground that it was too late. My Brother *Alderson* thought, that he was bound to refuse the application, in consequence of a supposed decision upon the point in a case of *Orchard v. Mossy*, where the Court of Queen's Bench held, that an appeal from the order of a Judge must be made within a reasonable time. We fully concur in that decision. But the present proceeding is not an appeal from a Judge's order, but an application by the plaintiffs for the order, preliminary to getting their costs taxed. We also concur with the Queen's Bench in holding, that, although a plaintiff in his own delay may wait for eleven months or longer, which is in mercy to the defendant, it is not, then, too late for the Judge to make the order, if the Judge is satisfied that it is a case of concurrent jurisdiction. The rule therefore must be made absolute.

Rule absolute.

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ELD v. VERO.

May 9.

HUGH HILL had obtained a rule calling on the plaintiff to shew cause why the sum of 59*l.* 12*s.*, deposited by the defendant in lieu of bail and paid into Court, should not be paid out to the assignee of the defendant.

It appeared by the affidavits that the defendant had been arrested on the 9th of March, under a warrant in this suit out of the County Court of Lancashire, under the Absconding Debtors Act, 14 & 15 Vict. c. 52, and that on the day of his arrest he had deposited with the high bailiff of the County Court, in lieu of bail, the amount indorsed upon the warrant, and the additional sum of 10*l.* for costs, and that thereupon he had been discharged out of custody. On the 10th the defendant was again arrested under another warrant, at the suit of other parties, and was lodged in prison. On the 12th a writ of summons and a *capias* were issued in this action by the plaintiff; and on the 14th the writ of summons was delivered to the defendant, but the writ of *capias* was never served upon him. On the 17th the defendant petitioned the Insolvent Debtors Court, and two days afterwards the vesting order was made. On the 22nd, the money, which had been received by the high bailiff from the defendant, was handed over to the sheriff of the county, who paid it into Court. A summons had been taken out before *Alderson*, B., at Chambers, when he referred the matter to the Court.

Where a party has been arrested under a warrant granted under the Absconding Debtors Act, 14 & 15 Vict. c. 52, and, upon making a deposit in lieu of bail, has obtained his discharge from custody, the writ of *capias*, which is required by the Act to be issued, need not be served upon him, and the case is the same, although he be, at the time the *capias* is issued, and continues in custody at the suit of a third party.

Lush shewed cause (May 6).—The objection raised by the defendant to these proceedings is, that he has not been served with the writ of *capias* issued in this action; but the necessity for service of the writ does not exist in a case where the defendant is not in custody under the warrant. Here the defendant had obtained his discharge

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by payment of the deposit in lieu of bail. The proviso in the 1st section of the Act (a) expressly provides, that

(a) The following portions of the Act were referred to in the argument:—

Sect. 1 contains the following proviso: "Provided always, that every creditor who shall cause such warrant to issue, shall forthwith cause to be issued a writ of capias, and also, in cases where no action shall be pending, shall, before the issuing of such writ of capias, cause a writ of summons to be issued out of some one of the superior Courts of law against such debtor or debtors; and that upon such capias all mandates and warrants shall issue according to the practice now in use, notwithstanding that the defendant shall have been arrested by virtue of any warrant or warrants granted by such commissioner or judge, and such debtor or debtors shall, if in custody, be served with such writ of capias within seven days from the date of such warrant, including the day of such date; and thereupon such debtor or debtors shall be considered and deemed to have been arrested by virtue of the said writ of capias, and all proceedings shall be had upon such writ of capias as if the same had been issued prior to the issuing of such warrant, and the arrest made on such writ of capias, and according to the practice now observed in the said superior Courts of law."

Sect. 5 enacts, "It shall be lawful for any person arrested

upon any such warrant, forthwith, before the issuing of the said writ of capias, to pay the debt and costs which shall be indorsed on such warrant to the said messenger or high-bailiff as aforesaid, or to enter into a bail bond to such messenger or high-bailiff, with two sufficient sureties, for the amount which shall be indorsed on such warrant, conditioned to put in special bail as required by the said warrant, or to make deposit of the sum indorsed on such warrant, together with 10% for costs; and thereupon he shall be entitled to be discharged from custody, and such messenger or high-bailiff is hereby authorised to discharge such person accordingly."

Sect. 6 enacts, "As soon as the person, so arrested as aforesaid, has been taken into custody, or detained under the writ of capias hereinbefore mentioned, the force and effect of the said warrant, so granted as aforesaid, shall immediately cease and determine; and the said sheriff shall hold the said person under or by virtue of the said writ of capias, in like manner as if the said person had been first arrested under and by virtue of the same, or in case the person so arrested shall have made deposit with the said messenger or high-bailiff as aforesaid, or entered into such bail-bond as aforesaid, then upon delivery to the messenger or high-bailiff respec-

"such debtor shall, *if in custody*, be served with such writ of *capias* within seven days from the date of such warrant." The defendant, however, will rely upon the 6th section, which contains a proviso, that if no writ of *capias* be issued and *served* within seven days from the date of the warrant, the person arrested under the warrant shall be entitled to be discharged from custody; or, in case the deposit has been made with, or bail-bond given to, the messenger or high-bailiff, then the deposit shall be returned, and the bail-bond given up to be cancelled. The form of the indorsement upon the warrant, as given in the schedule to the Act, may be referred to as shewing that the defendant is to be served with the writ of *capias* only in

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tively, by whom such person was arrested, of a copy of the warrant granted by the sheriff upon such writ of *capias* as aforesaid, the said messenger or high-bailiff shall pay over to such sheriff as aforesaid the said deposit, or assign to the said sheriff such bail-bond as aforesaid; and the said sheriff shall then hold the said deposit or bail-bond, and shall be entitled to enforce the said bail-bond in his own name, or to assign the same in the same manner as if the said person had been first arrested on the said writ of *capias*, and the said deposit had been made or bail-bond entered into with the said sheriff: Provided always, that the said sheriff shall not be in any manner liable or answerable for any default, misbehaviour, or miscarriage of the person to whom such warrant was addressed, or of the person or persons making the arrest under and by virtue of the said warrant: Provided also, that

if no writ of *capias* be issued and served within seven days from the date of the said warrant, including the day of such date, the person arrested under such warrant shall be entitled to be discharged from custody, or in case the deposit has been made with, or bail-bond given to, the said messenger or high-bailiff, then the said deposit shall be returned, and the said bail-bond given up to be cancelled."

Sect. 7 enacts, "Such warrant shall be indorsed with the amount of debt and costs claimed by the plaintiff, in such manner as writs of *capias* are now directed to be indorsed; and, on payment of the amount so indorsed, all proceedings shall be stayed, and the person so arrested be discharged from custody, and he shall be at liberty afterwards to tax the costs so indorsed as if he had been arrested under a writ of *capias*."

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case he is in custody; for the second part of the form, in speaking of the proceedings upon his discharge, is silent as to the service of the writ. The indorsement, which is stated to be a warning to the defendant, is as follows:—
 “Within seven days of the date of this warrant, including the day of such date, you will be served with a writ of *capias*, and all proceedings will be had upon the said writ of *capias* as if this warrant had not issued; or you may be discharged forthwith on depositing in the hands of the officer, to whom this warrant is directed, the sum of and 10*l*. for costs; or on payment to such officer of the debt and costs indorsed on this warrant; or on entering into a bail-bond to such officer, with two sufficient sureties, for the amount indorsed on this warrant.” The necessity for the service of the *capias* upon a debtor who has obtained his discharge from custody, would often interpose insuperable impediments in the way of the creditor, and the service, if effected, would afford no information whatever to the debtor. In the case where he has made a deposit in lieu of bail, he might keep out of the way for seven days, and might then claim a return of the deposit.—He was then stopped by the Court.

H. Hill, in support of the rule.—In the present case the difficulty of affecting service upon the defendant did not exist, inasmuch as he was in custody during the whole time when the service ought to have been made. [*Pollock*, C. B.—The defendant was not in custody at the suit of the plaintiff, who cannot be presumed to know that his debtor had been arrested, and that he was in custody at the suit of other parties.] The defendant ought to have an opportunity of ascertaining at what time he may put in and perfect bail. He may obtain this information by seeing the writ of *capias*. The 6th section expressly requires the writ to be issued *and served* within seven days; and the 3rd section enacts that “the warrant or warrants

which shall be issued by virtue of this Act, shall be auxiliary only to the processes now in use, and shall be wholly void, and of none effect whatsoever, as a protection to the person on whose behalf such warrant shall have issued, unless such writ of *capias* shall be issued *and served* in manner aforesaid." By the word "service" is to be understood a personal service upon the defendant. In speaking of the copy of the warrant which is to be handed over to the messenger or high-bailiff upon the payment over by him to the sheriff of the amount deposited, the words used by the legislature in the 6th section are "upon *delivery*." The distinction between a delivery of the copy of the warrant and the service of the writ is remarkable. It is submitted that the writ of *capias* ought at all events to be served upon a defendant who is actually in custody. This statute has recently been introduced to the notice of this Court in *Masters v. Johnson* (a).

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Cur. adv. vult.

PARKE, B., now said—This was an application for the return of a sum of money that had been deposited in the hands of the sheriff's officer by the defendant upon his arrest under the Absconding Debtors Act, 14 & 15 Vict. c. 52. The question sought to be raised on the part of the defendant was, whether, upon his arrest, and after his having paid the deposit in lieu of bail, and obtained his discharge out of custody, the writ of *capias* required by the statute having been duly issued, it was also necessary that the writ should be personally served upon the defendant. We are clearly of opinion that it was unnecessary. Where the warrant is executed, and the defendant is called upon and pays the deposit provided for by the statute, nothing more is required beyond the subsequent issue

(a) Ante, p. 63.

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of the *capias*. That is expressly required by the 6th section, which provides—[His Lordship read the proviso, and proceeded:] The meaning of the term “served,” is merely that the writ shall be served in the case in which it is required by the statute, that is, where the party continues in custody, and does not make the deposit, and is also in custody on the same arrest in which he was originally taken. In such case the *capias* must be served upon him. But the statute does not require the service where the defendant has paid the debt and has got out of custody, although the writ must be issued. In the latter case it is unnecessary to serve the writ, inasmuch as it would be of no use to the party. Mr. *Hill* contended that it ought to be served, that he may know the proper time for putting in bail; but having made the deposit according to the statute, he does not want to know the time for doing so. We are therefore of opinion that the rule must be discharged; but as the case is not free from doubt, and as this is the first occasion upon which this question has arisen, the rule will be discharged without costs.

Rule discharged, without costs.

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ATTENBOROUGH v. LONDON.

May 6.

DEBT for money lent, interest, and on accounts stated. Pleas, first, never indebted; and secondly, that the claim in the declaration was for monies lent by the plaintiff as a pawnbroker, in various sums, not exceeding 10s. each, and for interest allowed by the Pawnbrokers Act, and for such monies and interest found to be due upon accounts stated; and that such monies were so lent by the plaintiff to the defendant, upon security of goods taken by the plaintiff as such pawnbroker from the defendant, by way of pawn and pledge; and that each of those loans was a transaction within the Pawnbrokers Act, and ought to have been regulated and transacted according to that Act; and that the plaintiff in each of those transactions neglected to give to the defendant, being the person pawning the goods, any note or memorandum fairly and legibly written or printed, or in part written and in part printed, containing therein a description of the goods which the plaintiff had received in pawn, and the sum of money advanced thereon, with the day of the month and year on which, and the name and place of abode of the defendant, who was the person by whom the goods were pawned, and whether the defendant was a lodger or housekeeper, by using the letter "L" for lodger, or the letter "H" for housekeeper, and also the name and place of abode of the defendant, being the owner of the goods, according to the information of the defendant given to the plaintiff at the time of such pawnings. The plaintiff traversed this plea.

At the trial, before *Alderson*, B., at the London Sittings in the present Term, it appeared that the plaintiff was a pawnbroker, and that the defendant had been in the habit of pawning various articles with him prior to the month of October, 1851; and that the plaintiff had, upon these occasions, made the necessary inquiries of the defendant,

A pawnbroker complies with the requisites of the Pawnbrokers Act, 39 & 40 Geo. 3, c. 99, s. 6, by inserting in the note or memorandum he delivers to the pawnor, a statement of the matters specified in that section, upon the information he receives from the pawnor, although such information be false, provided the insertion be made *bonâ fide* and in ignorance of its falseness.

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and had given the notes as required by the Pawnbrokers Act, 39 & 40 Geo. 3, c. 99, s. 6. The present action was brought to recover the balance of the amount lent upon certain articles pawned by the defendant at various times subsequent to October. The articles had been sold, and credit was given for the amount. On the latter occasions, the plaintiff had inserted the letter "H" for housekeeper, as he had been accustomed to do on all the former occasions. On the part of the defendant it was shewn that he was a lodger and not a housekeeper at the time these notes were given; but it also appeared that the defendant, who was a foreigner, spoke very indistinctly, and that there was great difficulty in ascertaining what he said; that the plaintiff had no ground for supposing that the defendant had ceased to be a housekeeper, and that there was no reason why the plaintiff should have inserted a false address in the notes. The learned Judge told the jury that, if they were satisfied that the plaintiff, acting upon the information he had received from the defendant, had filled up the notes in conformity with it, he had complied with the requisites of the 6th section of the Act. The jury found that he had, and returned a verdict for the plaintiff for the sum of 30*l.* 19*s.*

Wordsworth now moved for a rule nisi for a new trial, on the ground of misdirection, and also of the verdict being against evidence.—The question turns upon the true construction of the 6th section of the 39 & 40 Geo. 3, c. 99(a), which requires, as a condition precedent to the

(a) That section enacts, that "every person who shall take by way of pawn or pledge of or from any person or persons whomsoever any goods or chattels, of what kind soever the same shall be, and whereon shall be lent any sum of money exceeding 5*s.*, shall

forthwith, and before he, she, or they shall or may advance or lend any money upon such pawn or pledge, enter or cause to be entered in a fair and regular manner in a book or books to be kept by him, her, or them for that purpose, a description of the

right of the pawnbroker to recover back the money advanced by him upon articles pledged, that the note or me-

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goods or chattels which he, she, or they shall receive in pawn, pledge, or exchange, and also the sum of money to be advanced or lent thereon, with the day of the month and year on which and the name of the person or persons by whom such goods or chattels are so pawned, pledged, or exchanged; and the name of the street and number of the house, if the same shall be said to be numbered, where such person shall abide, and whether such person or persons is or are a lodger in or the keeper of such house, by using the letter 'L' if a lodger, and the letter 'H' if a housekeeper, and also the name and place of abode of the owner or owners of such goods and chattels, according to the information of the persons pawning, pledging, or exchanging the same; into all which circumstances the pawnbroker is hereby required to inquire of the party pawning before any money shall be lent or advanced, &c.; and upon every note or memorandum respecting any such pledge, whereon shall be lent any sum exceeding 10s. as aforesaid, shall be fairly and legibly written or printed the number of the entry of such pledge, so entered in such book or books as aforesaid; and every such person shall at the time of the taking of every pawn, pledge, or exchange whatsoever give to the person or persons so pawning, pledging, or exchanging the

same, a note or memorandum fairly and legibly written or printed, or in part written and in part printed, containing therein in like manner a description of the goods and chattels which he, she, or they have received in pawn, pledge, or exchange, and also the sum of money advanced thereon, with the day of the month and year on which and the name and place of abode and number of the house, if said to be numbered, of the person or persons by whom such goods or chattels are so pawned, pledged, or exchanged, and whether such person is a lodger or housekeeper as aforesaid, by using the letter 'L' if a lodger, and the letter 'H' if a housekeeper, and also the name and place of abode of the owner or owners thereof according to the information aforesaid, and upon which said note or memorandum, or on the back whereof, shall be moreover fairly written or printed the name and place of abode of the pawnbroker giving the same; which said note or memorandum the party or parties pawning, pledging, or exchanging the said goods or chattels shall, and he, she, or they is and are hereby required to, accept and take in all cases, and the pawnbroker shall not receive and retain such pledge unless the party pledging or offering to pledge the same shall accept and take such note or memorandum," &c.

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morandum given by him at the time should contain a correct statement of the facts to be inserted, as specified by that section. If the statement in the note or memorandum be false, the pawnbroker is debarred from recovering the amount he has advanced upon the goods. The decision in *Fergusson v. Norman* (a) is directly in the defendant's favour. [*Martin*, B.—According to the defendant's position, the pawnbroker would lose his money, if the party pawning the goods were, at the time, to give a false name, and the pawnbroker were to insert that name in the note required by the statute, although he had no reason to disbelieve the statement. The statute surely does not impose such a hardship upon the pawnbroker.] *Tindal*, C. J., in *Fergusson v. Norman*, in his judgment, after stating that contracts, upon the pledging of goods, are void, unless the requisites prescribed by the Act are observed, says: "It appears, therefore, that there are acts to be done by the pawnbroker before and at the time of entering into the contract; and it is quite evident that the statute was passed, not only for the purpose of protecting the numerous parties who borrow money on small pledges, but also the public, against frauds committed on third persons, the real owners of the goods, by pledging their property without their consent; for the pawnbroker's entries would facilitate the detection of any fraud or robberies so committed." [*Pollock*, C. B.—That case merely decides that the description of the residence of the party by whom the goods are pawned is not sufficient, where it appears that the place, inserted as the residence, is large and contains streets and houses, and where the name of the street and the number of the house are omitted. In the case referred to, the description of the residence was merely "Pimlico," which, according to the requisites of the 6th section, was clearly insufficient, for it appears by the facts of that

(a) 5 Bing. N. C. 76.

case "that Pimlico embraces a district about four miles round. It is very populous, and contains many streets, houses, places, courts, and squares." *Alderson, B.*—The Act merely requires that the pawnbroker should put down the address, &c. according to the information he receives from the party, but he is not bound by the truth of it.] It would seem from that case that the onus of ascertaining the true state of the facts to be entered in his books and in the note given, is cast upon the pawnbroker, as otherwise the statute would be of little practical benefit to the public. The question for the opinion of the Court there was, whether the plaintiffs were entitled to recover by reason of the misdescription.

POLLOCK, C. B.—There will be no rule in this case, as we are all clearly of opinion that where the pawnbroker, to whom the goods are offered in pledge, acts upon the information which he has received from the party who has pawned goods with him on former occasions, and having no reason to believe that any change has taken place with respect to any of the various matters of inquiry, inserts that information in the note or memorandum delivered to the party, he thereby complies with the requisites of this section of the statute. In the present case the question was distinctly put to the jury whether the plaintiff had acted upon the information which he had so received from the defendant, and the jury found that he had. The direction was right, and the jury, upon the evidence, were justified in their finding.

PARKE, B.—I am of the same opinion. It was left to the jury to say whether the plaintiff, in the description contained in the note or memorandum delivered by him to the defendant, had acted upon the information he had received from the defendant, and the jury found that he had. Now, according to the express language of this sec-

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tion, the pawnbroker is merely required to deliver the note or memorandum containing the matters mentioned in the section, "according to the information aforesaid," that is "according to the information of the persons pawning, pledging, or exchanging" the goods. There was conflicting evidence as to the statements made by the defendant at the time; but the jury have found that the plaintiff filled up the document delivered in pursuance of the information he received from the defendant; and there is no ground for supposing that he had put them down falsely. I think, therefore, that the defendant has no right to complain that the verdict is not supported by the evidence. The case of *Fergusson v. Norman*, upon which so much reliance has been placed, when examined, will be found not to be rested upon the doctrine for which the defendant's counsel has contended. In that case, the pledge was held to be void, upon the ground that the requisites had not been properly observed in the description of the pawnor as a lodger or housekeeper, or in the description of his place of abode. It was not sufficient to state that the party resided at "Pimlico," that being a large place, containing many streets and houses. The pawnbroker there ought to have asked the party in what part of Pimlico he resided, and by not having done so, he failed to comply with the requisites of the statute. But where the pawnbroker acts upon the account of the party pledging the goods, unless, perhaps, he knows that account to be a false one, he complies with the statute. It would be a monstrous proposition, to say that a pawnbroker is subject either to the loss of the money he advances upon the pledge, or of the pledge by reason of the false information which he has received, the truth of which he may have no means of ascertaining, and especially when it is remembered that the parties who are wont to pawn arti-

cles are frequently perfect strangers to the pawnbrokers; and, moreover, that property is seldom pledged at all except under the pressure of extreme penury and misery. The requirements of the statute are not of that stringent character which the defendant's counsel seeks to attribute to them.

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ALDERSON, B., concurred.

MARTIN, B.—I am entirely of the same opinion. The case of *Fergusson v. Norman* does not support the proposition, that, in a case where the party pawning the goods gives a false name to the pawnbroker, which the latter, in ignorance of the truth, inserts in the note or memorandum, the transaction is illegal, and the pawnbroker cannot recover back the money he has advanced upon the goods; and, moreover, that he may be sued by the owner of the property and be compelled to restore it. I should be extremely sorry if such were the state of the law, but there is no authority for saying that such is the case.

Rule refused.

1853.

April 27.

SPENCE v. HEALEY.

A covenant for payment of a sum certain, although the payment does not accrue until after notice given, cannot be discharged by parol before breach.

THE declaration stated that one John Edward Spicer, by deed, covenanted with the plaintiff, that, upon the expiration of six calendar months after the said J. E. Spicer received notice in writing from the plaintiff requiring the said J. E. Spicer so to do, such six calendar months to be computed from the service of the said notice, he the said J. E. Spicer would repay to the plaintiff a certain sum of 1500*l*.; and the defendant, by the said deed, also covenanted with the plaintiff, that, upon the expiration of six calendar months after the said J. E. Spicer and the defendant received a notice in writing as aforesaid from the plaintiff requiring the repayment of the said 1500*l*. as aforesaid, he the said J. E. Spicer or the defendant would pay to the plaintiff the sum of 1000*l*., parcel of the said 1500*l*.; and the plaintiff avers that the said J. E. Spicer and the defendant have respectively received notice in writing from the plaintiff requiring the said J. E. Spicer to repay to the plaintiff the said sum of 1500*l*.; and, although six calendar months, computed from the service of the said notice according to the said deed have elapsed before action brought, yet neither the said J. E. Spicer nor the defendant have paid the said 1000*l*. according to the said covenant; and although the plaintiff has been satisfied 800*l*., parcel thereof, the residue remains unpaid.

The defendant pleaded, secondly, that before action and before any breach of the said covenant, he satisfied and discharged the plaintiff's claim by delivering to him goods, machinery, fixtures, and chattels.

Demurrer, and joinder.

Hugh Hill, in support of the demurrer.—The plea

affords no answer to the action. It is a well-known principle, that satisfaction and discharge before breach by parol cannot be set up as an answer to an action for the breach of a covenant under seal. Upon this point there are numerous authorities. In the recent case of *The Mayor of Berwick v. Oswald* (a), the point was in fact abandoned. [Parke, B.—I have noted on the back of my paper book eight several authorities upon this point (b).]

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Brewer contra.—The present case is distinguishable from that lately decided in the Court of Queen's Bench. This is not an absolute covenant for the payment of a sum of money, but a covenant for the payment upon a contingency, in which case it would seem that a plea of an accord, executed before the contingency happened, is good: Com. Dig. "Accord," (A. L), *Neale v. Sheffield* (c). And in *Blake's case* (d), it is laid down, that "there is a difference when a duty accrues by the deed in certainty, tempore confectionis scripti, as by covenant, bill, or bond to pay a sum of money, there this certain duty takes its essence and operation originally and solely by the writing; and therefore it ought to be avoided by a matter of as high a nature, although the duty be merely in the personalty. But when no certain duty accrues by the deed, but a wrong or default subsequent together with the deed gives an action to recover damages, which are only in the personalty, for such wrong or default, accord with satisfaction is a good plea." The plea, therefore, may be supported upon the principle there expounded, as setting

(a) 1 E. & B. 295.

(b) Bac. Abr. "Accord and Satisfaction" (A); *Snow v. Franklin*, 1 Lutw. 358; *Blake's case*, 6 Rep. 44 b; *Alden v. Blague*, Cro. Jac. 99; *Neale v. Sheffield*,

Cro. Jac. 254; *Kaye v. Waghorn*, 1 Taunt. 428; *Covill v. Geffery*, 2 Roll. Rep. 96; *Mayor of Berwick v. Oswald*, 1 E. & B. 295.

(c) Cro. Jac. 254.

(d) 6 Rep. 44 a.

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forth an accord and satisfaction before breach to a covenant for a payment upon a contingency.

Hill, in reply.—An obligation to pay a sum certain, although a notice be required, cannot be got rid of by parol. The cases cited are precisely in point.

PARKE, B.—The plea is bad. Wherever damages only are sought to be recovered, such a plea affords a good answer to the action; but where the covenant is for the payment of a sum certain, the covenantee has a right to object that the discharge is not by deed.

MARTIN, B.—I am sorry that I am compelled to agree in holding that the plea is bad. It is difficult to see the correctness of the reasons upon which the rule is founded.

POLLOCK, C. B., and PLATT, B., concurred.

Judgment for the plaintiff.

1853.

BODDINGTON and Others v. DE MELFONT.

May 7.

THIS was a rule, calling on the plaintiffs to shew cause why the judgment of waiver, signed against the defendant in this cause, should not be reversed on entering a common appearance. The affidavits in support of the application stated, that the defendant was the widow of a Frenchman, and had for many years resided in France, and that during her residence there proceedings were taken and judgment of waiver signed against her; that she had no residence in England, though she frequently visited this country; that the debt in question was contracted with her agents for managing her property in the West Indies; and that she was not residing abroad for the purpose of avoiding payment of it. A similar application had been made to *Martin*, B., at Chambers, who referred the matter to the Court.

The Court will, on motion, reverse an outlawry on mesne process for error in fact, on payment of costs and entering a common appearance, if the case is one in which the defendant could not have been held to bail under the 1 & 2 Vict. c. 110.

Aspland shewed cause (April 16).—The judgment of waiver ought not to be reversed, except on payment of costs and putting in special bail. *Commerell v. Beauclerk* (a) decided that where a writ of error is brought by attorney to reverse an outlawry on mesne process, for error in fact, the Court has power, under the 4 & 5 W. & M. c. 18, to require special bail, and they will impose that term in cases where the defendant might have been held to bail under the 1 & 2 Vict. c. 110. The 4 & 5 W. & M. c. 18, s. 3, enabled persons outlawed to appear by attorney, and reverse their outlawry without bail, except where special bail should be ordered by the Court. It would seem, however, from the case of *Craig v. Levy* (b), that the object of that enactment was merely to assimilate the practice of the Courts of King's

(a) 1 Bail C. C. 1.

(b) 1 Exch. 570.

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and Common Pleas. All the authorities are in favour of the exercise of the right to require special bail. In *Serocold v. Hampsey* (a), where the outlawry was reversed by reason of the defendant being abroad at the time of the exigent proclaimed, and the case was one in which special bail was required in the original action, the Court directed the recognisance of bail in the new action to be taken in the alternative, to pay the condemnation money, or render the principal. *Lee*, C. J., there says, "By statute 31 Eliz. c. 3, bail is to be given to a new action, and to satisfy the condemnation money, where the reversal is for want of proclamation; but here the assignment of error is, that the defendant was beyond the sea at the time, and not for want of proclamation. There is no case cited where bail may not be taken on reversal of an outlawry for other cause than that in the statute 31 Eliz." [*Pollock*, C. B.—I concur in the observations of Lord *Abinger* in *The Bank of England v. Reid* (b). Since the 1 & 2 Vict. c. 110, a defendant is entitled to set aside his outlawry, without putting in special bail, unless the case is one in which a Judge would have made an order under the 1 & 2 Vict. c. 110, and there is ground for concluding that the defendant remains abroad in order to deprive the plaintiff of an opportunity of obtaining bail. If this defendant had chosen to enter a common appearance to the action, she might have done so; then why are we to require special bail, when the proceedings are erroneous?] The distinction has always been, that a party may reverse his outlawry by writ of error, *ex debito justitiæ*; but if he applies by motion, the Court may impose terms: *Harvey v. O'Meara* (c), *Havelock v. Geddes* (d). The 1 & 2 Vict. c. 110 does not affect the power of the Court in that respect. On the removal of a cause commenced since that Act by foreign attachment in

(a) 12 East, 624, n.

(b) 7 M. & W. 159.

(c) 7 Dowl. P. C. 725.

(d) 12 East, 622.

the Lord Mayor's Court, the plaintiff is still entitled to an order for special bail or a procedendo: *Day v. Paupierre* (a), *Bastow v. Gant* (b). The case of *Porter v. O'Meara* (c), where the Court reversed the outlawry on motion without requiring special bail, was an action on a judgment, and the defendant was residing in this country at the time of the application. So also in the case of *Harvey v. O'Meara* (d), the defendant was in this country. Assuming then that the Court has power to impose this term, the case is a proper one in which to exercise it; for, as the defendant has no property within the jurisdiction of the Court, unless special bail be required, the process of waiver will be nugatory.

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Montagus Smith in support of the rule.—The defendant is entitled to reverse the judgment of waiver on entering a common appearance. Before the 1 & 2 Vict. c. 110, the practice was, in all bailable actions, to impose, as a term of the reversal of outlawry, the putting in special bail. That practice was consistent with the provisions of the 4 & 5 W. & M. c. 18. The 1 & 2 Vict. c. 110, abolished arrest on mesne process, except in certain cases: therefore, the rule which the Court will now adopt is, to consider whether the case is one in which the defendant could have been held to bail under that statute, and in such case only will they require special bail on reversal of the outlawry. This defendant did not go abroad to evade payment of her debts, but was a domiciled subject of France. Unless the discretion of the Court is exercised with reference to the provisions of the 1 & 2 Vict. c. 110, this consequence will follow: that no foreigner will be able to reverse an outlawry on the ground that he was resident

(a) 13 Q. B. 802.

N. C. 626.

(b) Id. 807, n.

(d) 7 Dowl. P. C. 725.

(c) 7 Dowl. P. C. 657; 5 Bing.

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abroad, unless he puts in special bail. In the case of *The Bank of England v. Reid* (a), Parke, B., says, "Since the statute 1 & 2 Vict. c. 110, and the decision of my Brother Coleridge in *Harvey v. O'Meara*, the general rule of the Courts ought to be, to discharge a defendant from outlawry on entering a common appearance and on payment of costs. If the plaintiff says, that he has lost an opportunity of arresting the defendant, he should make that clearly appear by affidavit." Until the decision in *Commerell v. Beauclerk* (b), the invariable practice was in accordance with that suggestion.

Cur. adv. vult.

PARKE, B., now said.—This case stood over in order that the Court might consider what terms they would impose in reversing an outlawry on motion. Formerly, it was usual, in all bailable actions, to require the defendant to put in special bail. But now no defendant can be held to bail as a matter of course, but only on application to a Judge by affidavit, shewing that the defendant is about to quit England in order to avoid payment of the debt. That does not apply to this defendant, who was a domiciled French subject, and had for a long time resided in France. The Court are of opinion that the proper terms to be imposed are the payment of costs and the entering a common appearance to the action. When judgment is obtained, if the plaintiffs cannot recover the fruits of it by execution, they may proceed to outlawry on that judgment, in which case the defendant cannot reverse it without appearing in person. Should she appear, she will become amenable to the process of the Court, in case the plaintiffs choose to exercise their power of issuing a *capias* against her; and if she does not appear, the judgment of waiver will continue until the plaintiffs have obtained satisfaction. Therefore,

(a) 7 M. & W. 159.

(b) 1 Bail C. C. 1.

we are of opinion that the terms upon which this judgment of waiver ought to be reversed are simply the entry of a common appearance to the action and the payment of costs, including the costs of this application.

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Rule absolute accordingly (a).

(a) The 15 & 16 Vict. c. 76, s. 24, abolishes outlawry on mesne process.

JOSEPH HUNT v. BISHOP.

April 19.

EJECTMENT under the Common Law Procedure Act (15 & 16 Vict. c. 76), to recover possession of certain land and buildings.—The writ was in the form prescribed by Schedule (A), No. 13, of the above statute.

The defendant appeared by attorney to the writ, and defended for the whole of the land and premises therein mentioned.

At the trial, before *Alderson*, B., at the last Hertford Spring Assizes, the following facts appeared:—By indenture of the 31st of May, 1852, between Edward Hunt of the one part, and J. Bishop (the defendant) of the other part, Edward Hunt demised to J. Bishop a piece of land, situate at Waltham Lane, in the parish of Cheshunt, in the county of Hertford, together with four dwelling-

By indenture of the 31st of May, 1852, E. H. demised to the defendant, for ninety-nine years, a piece of land and four unfinished dwelling-houses; and the defendant covenanted, that he would, on or before the 25th of June, 1852, finish the dwelling-houses "under the direction and to the satisfaction of the surveyor of E. H.:" Provided that, if default should

be made, it should be lawful for E. H. "into the demised premises, or any part thereof in the name of the whole, and repossess, retain, and enjoy the same as of his former estate." By indenture of the 30th of July, 1852, between E. H. of the one part, and the plaintiff of the other part, after reciting an indenture of lease of the 18th of February, 1852, whereby S.W. demised to E. H. certain land (including the land in question) for ninety-nine years, and that E. H. had made underleases, E. H. assigned to the plaintiff the said leasehold premises, "and all the estate, right, title, and interest of him the said E. H. in, to, or out of the said premises," for the residue of the term of years granted by the aforesaid indenture of lease; subject, nevertheless, to the underleases thereinbefore referred to. The defendant did not complete the houses at the stipulated time; whereupon the plaintiff brought an action of ejectment against him. No surveyor had been appointed:—*Held*, first, that the appointment of a surveyor was a condition precedent to the performance of the defendant's covenant to complete the houses.

Secondly—That a right of entry for condition broken is not assignable under the 8 & 9 Vict. c. 106, s. 6.

Semble—That there was a sufficient power of re-entry; also, that the assignment operated as a waiver of any forfeiture.

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houses then in course of erection thereon: Habendum from the 24th of June, 1851, for the term of ninety-nine years, at certain rents. The lease contained (*inter alia*) the following stipulations:—And the said J. Bishop doth hereby covenant with the said E. Hunt, that he the said J. Bishop “shall and will, on or before the 25th day of June, 1852, at his own costs, &c., complete and finish, in a good and workmanlike manner, fit for habitation, the said four messuages or dwelling-houses now erecting or building by him the said J. Bishop upon the said piece or parcel of ground hereby demised, under the direction and to the satisfaction of the surveyor of the said E. Hunt, his executors &c. or assigns, and in all things conformable to the agreement in that behalf, dated the 29th of September, 1851, and made between the said E. Hunt of the one part, and the said J. Bishop of the other part:” Provided always, that, “if default shall be made in performance of any of the covenants herein contained on the part of the the said J. Bishop, it shall be lawful for the said E. Hunt, his executors &c. or assigns, into the demised premises or any part thereof in the name of the whole (*a*), and repossess, retain, and enjoy the same as of his former estate, this indenture or anything herein contained to the contrary notwithstanding.” By indenture, made the 30th of July, 1852, between E. Hunt of the one part, and Joseph Hunt (the plaintiff) of the other part, reciting (*inter alia*), that, by an indenture of lease, dated the 18th of February, 1852, and made between S. Walters of the first part, the said Joseph Hunt of the second part, and the said E. Hunt of the third part, for the considerations therein mentioned, S. Walters, at the request of J. Hunt, did demise, and J. Hunt did grant and demise unto E. Hunt all that piece or parcel of freehold land or ground, situate on the north side of Waltham Lane, in the parish

(*a*) *Sic.*

of Cheshunt, in the county of Hertford, for ninety-nine years from the 29th of September, 1851: Also reciting, that, since the granting of the aforesaid indenture of lease, E. Hunt had entered into several agreements and underleases affecting the said leasehold premises, the particulars of which are known to the said J. Hunt: It was witnessed, that E. Hunt, for the considerations therein mentioned, did "bargain, sell, assign, transfer, and set over unto the said J. Hunt all and singular the aforesaid leasehold premises, with their appurtenances, and all the estate, right, title, and interest of him the said E. Hunt, in, to, or out of the said premises, and every part thereof: To have and to hold the said premises hereby assigned, and every part thereof, for the residue of the term of years granted by the aforesaid indenture of lease, and all other the estate and interest of the said E. Hunt therein or thereout; subject, nevertheless, to the agreements and underleases hereinbefore referred to." The defendant did not complete the houses at the stipulated time; and for that breach of covenant this action of ejectment was brought. No surveyor had been appointed, either by E. Hunt or J. Hunt.

It was submitted, on the part of the defendant, that the plaintiff could not recover, on the grounds, first, that the appointment of a surveyor was a condition precedent to the defendant's performance of the covenant to complete the buildings; secondly, that the lease contained no power of re-entry; thirdly, that the forfeiture (if any) was waived by the assignment; and fourthly, that the right of entry was not assignable. The learned Judge directed a nonsuit, reserving leave to the plaintiff to move to enter a verdict for him.

Montagu Chambers now moved accordingly.—First, the covenant was broken by the non-completion of the houses on the 25th of June, 1852. The appointment of a sur-

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veyor was not a condition precedent to the defendant's performance of the covenant. There is an absolute and independent covenant to complete the houses on a given day, and, in addition, to complete them to the satisfaction of the lessor's surveyor. The case of *Coombe v. Greene* (a), which is relied on by the other side, is distinguishable, for there the covenant was to spend a certain sum of money in improvements of the premises under the direction of a surveyor, and consequently, until a surveyor was appointed, no directions could be given as to how the money was to be expended. This case resembles *Cannock v. Jones* (b), where an agreement to leave certain works to the superintendence to two persons was held not to be a condition precedent to or concurrent with a covenant to do the work. Secondly, the lease contains a sufficient power of re-entry. The term "repossess" is enough for that purpose, although the word re-enter is omitted. Thirdly, the assignment was no waiver of the forfeiture. The mention of underleases in the assignment is not conclusive to shew that the lessor intended to recognise this lease as a valid lease. He might have had no knowledge at the time that a forfeiture had occurred. [*Platt*, B.—He assigns the premises subject to the underleases.] It is not like the acceptance of rent, or other act which indicates an intention to treat the lease as subsisting. Fourthly, the right of entry for condition broken was assignable. The 8 & 9 Vict. c. 106, s. 5, enacts: "That, after the 1st of October, 1845, a contingent, an executory, and a future interest, and a possibility coupled with an interest, in any tenements or hereditaments, of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a *right of entry*, whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England of any tenure, may be disposed of by deed," &c.

(a) 11 M. & W. 480.

(b) 3 Exch. 233.

The meaning of the term "right of entry" will appear by reference to the 7 & 8 Vict. c. 76, which was repealed by the 8 & 9 Vict. c. 106. The 5th section of the 7 & 8 Vict. c. 76 enacted: "That any person may convey, assign, or charge by any deed any such contingent or executory interest, *right of entry for condition broken*, or other future estate or interest as he shall be entitled to, or presumptively entitled to, in any freehold, copyhold, or leasehold land," &c. This was a vested right of entry, which passed by the assignment.

Cur. adv. vult.

POLLOCK, C. B., now said.—This was a case tried before my Brother *Alderson*, in which the assignee of a reversion sought to obtain possession of land leased by his assignor, on the ground of a breach of covenant. We are all clearly of opinion that there ought to be no rule. The plaintiff, who brought this action of ejectment under the Common Law Procedure Act, had obtained the assignment after the alleged breach of covenant; and Mr. *Chambers* urged, that he was entitled to recover, since a right of entry for condition broken was assignable by the 8 & 9 Vict. c. 106, s. 6; and he also referred to the 7 & 8 Vict. c. 76. The lease has, in reality, no clause of re-entry. The proviso is, that if the buildings shall not be completed on a certain day "it shall be lawful for the lessor into the demised premises, or any part thereof in the name of the whole, and repossess." Possibly the word "re enter" was intended to be inserted, but by some clerical error was omitted. If that had been the only objection, we should not perhaps have thought it sufficient to prevent the right of re-entry being exercised by the proper party; but the proviso relates to the performance of a covenant, by which certain buildings were to be completed "under the direction and to the satisfaction of the lessor's surveyor." In point of fact, no surveyor was appointed, and therefore no direction could

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be given or satisfaction expressed. We think, therefore, that there was no breach of the condition. But, assuming that the condition was broken by the non-completion of the buildings at the time appointed, the assignment to the present claimant was not until after that period, and the deed of assignment expressly conveys the property subject to underleases. But then it was said, that the assignment was no waiver of the forfeiture, because the assignor did not know of it. We very much doubt, whether, on that ground, it would be competent to the assignee to take advantage of the forfeiture. At all events, we think that the 8 & 9 Vict. c. 106, does not relate to a right to repossess or re-enter for a condition broken, but only to an original right where there has been a disseisin, or where the party has a right to recover lands, and his right of entry and nothing but that remains. For these reasons we think that there ought to be no rule.

Rule refused.

April 23.

RENEAUX v. TRAKLE.

A husband living with his wife, and who makes her a sufficient allowance for dress, is not liable for dresses supplied to her without his knowledge; and the fact of the wife having, within a particular period, purchased various articles of dress of different tradesmen, is admissible in evidence to rebut the presumption, arising from cohabitation, of an implied authority to contract for necessary clothing.

ACTION for goods sold and delivered, &c.

Plea, as to 10*l.*, parcel &c., payment into Court, and as to the residue "never indebted."

At the trial, before *Platt*, B., at the Middlesex Sittings in last Hilary Term, it appeared that the action was brought by the plaintiff to recover the sum of 33*l.* for various articles of dress supplied by his wife, a milliner, to the defendant's wife, during a period of fourteen months. The plaintiff had an annual income of about 370*l.* a year. His wife and two children resided in the same house with him, and he allowed his wife 30*l.* a year for her dress. The ar-

ticles in question, some of which were of an expensive description, were supplied to the defendant's wife without his authority or knowledge; and it did not appear that he was aware that his wife wore them, since she was in the habit of putting them on in his absence from home, and of wearing plainer clothes when he returned. The defendant's counsel proposed to prove that the defendant's wife, without his consent or knowledge, had procured other articles of dress from different tradesmen, within the same period, to the amount of 150*l*. The learned Judge rejected this evidence, and left it to the jury to say, whether the articles in question were suitable to the station in life of the defendant's wife; and they found a verdict for the plaintiff for 30*l*. 4*s*. 9*d*.

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James in the same Term obtained a rule nisi for a new trial, on the ground of misdirection, and also of the improper rejection of the above evidence.

Brewer now shewed cause.—First, the question was properly left to the jury. A wife, who is living with her husband, has an implied authority to pledge his credit for articles suitable to her station. [*Martin*, B.—That is only a presumption arising from cohabitation, and may be rebutted. The question is one of agency. If a husband tells his wife that he will not permit her to have a particular kind of dress, she cannot bind him by ordering it.] The law is thus stated by Lord *Ellenborough* in *Waithman v. Wakefield* (a): “Where a husband is living in the same house with his wife, he is liable to any extent for goods which he may permit her to receive there; she is considered as his agent, and the law implies a promise on his part to pay the value. If they are not cohabiting, then he is in general only liable for such necessaries as from his station

(a) 1 Camp. 120.

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in life it is his duty to supply her." [Pollock, C. B.—A wife is not in a different situation from any other person in the establishment. If a servant goes to a shop, and orders goods in the name of his master, the tradesman is bound to inquire before he gives credit. If he does not, and it turns out that the order was without authority, the tradesman cannot sue the master. The apparent result of the authorities is, that, if a tradesman trusts a married woman, he must take his chance of payment.] Here there was evidence that the defendant adopted the act of his wife, for the goods were delivered at his house, and he did not return them. [Martin, B.—Assuming that the wife had *prima facie* an authority to order these articles, if her husband supplied her with sufficient dress, her authority to bind him was at an end.] Secondly, the evidence that the defendant's wife had ordered other articles of dress from different tradesmen was properly rejected. Those were transactions with third parties, of which the plaintiff had no knowledge. [Pollock, C. B.—The evidence was admissible for the purpose of shewing that the wife was already sufficiently provided with clothes, and therefore there could be no necessity for ordering the goods in question, or any implied authority from her husband to order them.]

Gray in support of the rule.—The evidence was admissible. If not, this consequence would follow, that a wife might obtain numerous articles of dress from different tradesmen, and her husband be liable to be sued by each, when in fact the goods supplied by one were all that were necessary and suitable to her condition. Here the defendant's wife had no authority whatever to pledge his credit. The fallacy consists in not advertng to the distinction between the cases, where a wife is living with her husband, and where she is living apart. In the former case, cohabitation raises a presumption of the husband's

assent to his wife's contract for necessities; but that may be rebutted, by shewing that the husband has sufficiently provided her with them. In *Montague v. Benedict* (a), *Holroyd, J.*, says, "Undoubtedly the husband is liable for necessities provided for his wife, where he neglects to provide them himself. If, however, there be no necessity for the articles provided, the tradesman will not be entitled to recover their value, unless he can shew an express or implied assent of the husband to the contract made by the wife. Where a tradesman takes no pains to ascertain whether the necessity exists or not, he supplies the articles at his own peril; and if it turn out that the necessity does not exist, the husband is not responsible for what may be furnished to his wife without his knowledge." [He was then stopped by the Court.]

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POLLOCK, C. B. (b).—We are all of opinion that the rule ought to be absolute for a new trial.

Rule absolute (c).

(a) 3 B. & C. 631.

(b) *Pollock, C. B., Platt, B., and Martin, B.*

(c) In the celebrated case of *Munby v. Scott* (1 Sid. 109), it was affirmed by a majority of the Judges, that during cohabitation the husband had the right to determine how his wife shall be clothed and fed. And in *Etherington v. Parrot* (2 Ld. Raym. 1006), *Holt, C. J.*, says, "If a husband turns away his wife he gives her credit wherever she goes, and must pay for necessities for her; but if she runs away from him, he shall not be liable to any of her contracts, for it is the cohabitation that is an evidence of the husband's assent to contracts made by his wife for necessities. But if the

husband have solemnly declared his dissent, that she shall not be trusted, any person that has notice of this dissent trusts her at his peril after; for the husband is only liable upon account of his own assent to the contracts of his wife, of which assent cohabitation causes a presumption; and when he has declared the contrary, there is no longer room for such a presumption; for the wife has no power originally to charge her husband, but is absolutely under his power and government, and must be content with what he provides, and if he does not provide necessities her remedy is in the spiritual Court." See also *Lane v. Ironmonger*, 13 M. & W. 369; 2 Smith's Lead. Cas. 282.

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April 27. HUMPHREYS, Administrator of S. HUMPHREYS, deceased,
v. Sir C. JENKINSON, Bart.

A deed does not require enrolment under the 53 Geo. 3, c. 141, s. 2, as a grant of an annuity, unless the alleged grantor is a party to the instrument.

A., by deed, granted an annuity to B.; a memorial of this deed was duly enrolled. B. subsequently released to A. by deed (which was not executed by A.) two-fifths of this annuity:—

Held, that the second deed did not require enrolment under the 53 Geo. 3, c. 141, s. 2.

THE declaration stated that the defendant, before he became baronet, by deed gave, granted, and confirmed unto the said Samuel Humphreys, his executors, administrators, and assigns, one annuity or clear yearly sum of 625*l.*, to be paid to the said S. Humphreys, his executors, administrators, and assigns, at or in the common dining-hall of Lincoln's Inn, in the county of Middlesex, by equal quarterly portions, on the 16th of January, 16th of April, 16th of July, and the 16th of October, in every year for and during the lives of the defendant and one Arthur Quartley, and the life of the survivor of them, between the hours of two and four in the afternoon of the same days respectively, without any deduction or abatement whatsoever out of the same or any part thereof for or in respect of any taxes, charges, assessments, or impositions, or other matter, cause, or thing whatsoever, the income or property tax only excepted. And the defendant, by the said deed, covenanted with the said S. Humphreys, his executors, administrators, and assigns, that they the defendant and the said A. Quartley, or one of them, would pay or cause to be paid to the said S. Humphreys, his executors, administrators, or assigns, the said annuity of 625*l.*, at the days and times and in manner aforesaid, of which annuity one year and two quarters of another year are due and unpaid. That, after the making of the said deed, by another deed, reciting amongst other things that the defendant and the said A. Quartley had requested the said S. Humphreys to execute a release of two equal fifth parts of the said annuity of 625*l.*, amounting to the yearly sum of 250*l.*, in manner thereafter mentioned and expressed, which he the said intestate had agreed and con-

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sented to do, the said S. Humphreys did remise, release, and quit claim unto the defendant and the said A. Quartley and each of them, and their lands, tenements, goods, and chattels, two equal fifth parts or shares of the said annuity of 625*l.*, the same into five equal fifth parts being considered as divided, amounting to the yearly sum of 250*l.*, and all actions, suits, claims, and demands whatsoever for and on account of the said yearly sum of 250*l.* or any part thereof, from the said 5th of January, 1814; and so and in such manner that the said annuity or yearly sum of 625*l.* should, from the day and year last aforesaid, be reduced to the yearly sum of 375*l.*: Provided always, that nothing in the said deed contained should operate or be construed or taken to operate to avoid or affect the said yearly sum of 375*l.*, or the covenants, charges, or remedies in and by the said first-mentioned deed contained and given for the recovery of the said annuity of 625*l.* (except as in the said second deed mentioned), so far as the same related to the recovery and receipt of the said yearly sum of 375*l.*, from the said 5th of January, 1814, and the arrears of the said annuity or yearly sum of 625*l.*, to the day and year last aforesaid. And the plaintiff avers that thirty-eight years and three-quarters of another year of the said yearly sum of 375*l.*, after deducting the income or property tax chargeable thereon, and to be deducted therefrom according to the said covenant and the statute in that case made and provided, are due and unpaid; and the plaintiff, as administrator as aforesaid, claims 15,265*l.* 12*s.* 6*d.* for debt, and 10,000*l.* for its detention.

The defendant pleaded, ninthly, "as to the causes of action which are alleged to have accrued in respect of the yearly sum of 375*l.* from the 5th day of January, 1814, in the deed in the declaration secondly mentioned, that the said deed was made in consideration of 2000*l.*, the monies of the defendant, paid to the said S. Humphreys, by direction of the defendant; and that the said deed was made

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after the passing of the 53 Geo. 3, c. 141, intituled &c., and that the said annuity of 625*l.* was granted for two lives upon and for a pecuniary consideration in that behalf, in money before then paid by the said S. Humphreys to the defendant; and that the said annuity of 375*l.*, in the said deed in the declaration secondly mentioned, was an annuity for two lives upon and for a pecuniary consideration in that behalf in money before then paid by the said S. Humphreys to the defendant; and that no memorial of the said deed in the declaration secondly mentioned was enrolled in the High Court of Chancery, within thirty days after the execution thereof, according to the directions of the said Act."

Demurrer, and joinder.

Hugh Hill, in support of the demurrer.—The plea is bad, for the deed secondly mentioned in the declaration did not require enrolment under the statute 53 Geo. 3, c. 141, s. 2 (a). That enactment applies only to *grants* of annuities. The instrument in question was not executed by the grantor of the original annuity, and cannot be re-

(a) That section enacts, "that within thirty days after the execution of every deed, bond, instrument, or other assurance, whereby any annuity or rent-charge shall, from and after the passing of this Act, be granted for one or more life or lives, or for any term of years or greater estate determinable on one or more life or lives, a memorial of the date of every such deed, bond, instrument, or other assurance, of the names of all the parties and of all the witnesses thereto, and of the person or persons for whose life or lives such annuity or rent-charge shall be granted,

and of the person or persons by whom the same is to be beneficially received, the pecuniary consideration or considerations for granting the same, and the annual sum or sums to be paid, shall be enrolled in the High Court of Chancery, in the form or to the effect following,—with such alterations therein as the nature and circumstances of any particular case may reasonably require: [Here follows the form]—otherwise every such deed, bond, instrument, or other assurance shall be null and void, to all intents and purposes."

garded in any sense as the grant of a fresh annuity; and consequently it is not open to the objection raised to it by the plea.—He was then stopped by the Court.

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Bramwell contra.—The second instrument required enrolment. The plea states, that “the said annuity of 375*l.* in the said deed in the declaration secondly mentioned, was an annuity for two lives,” &c. The second instrument, taken in connection with the first, is the real bargain between the parties, the two together constituting the terms upon which the annuity was granted. *Earle v. Browne* (a) is an authority in support of the plea. In that case B., in the year 1835, granted a life annuity of 180*l.* to E., secured by a warrant of attorney upon which judgment was entered up, by an assignment of a pension, and by a power of attorney to receive it in payment of the annuity. A memorial of this grant was duly enrolled. In 1837 the parties, at the request of B., executed an indenture, whereby E. covenanted to accept an annuity of 150*l.* in lieu and satisfaction of the former one of 180*l.*, and B. covenanted not to redeem it for a certain period; and it was declared that the annuity deed of 1835 and all collateral securities should be securities for the payment of the reduced annuity. The Court of Queen’s Bench held in that case, that the latter instrument was void for want of enrolment. [*Parke*, B.—There cannot be a grant of an annuity unless there be also a grantor. *Martin*, B.—The second deed merely extinguishes a portion of the then existing annuity; that instrument does not create a fresh annuity.] The Court in that case expressly laid down the principle upon which their decision proceeded. Lord *Denman*, C. J., after expressing that he entertained no doubt upon the case, said: “We shall repeal the statute if we decide that this second annuity need not be registered; for there will

(a) 10 A. & E. 412.

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be a total absence of that security which the legislature has required. We are bound to set aside the second bargain, because that is now the real one between the parties; and as the former securities, and the judgment thereon, have become securities for the latter bargain, these also must be set aside." And *Littledale*, J., said, "The alteration of an annuity requires enrolment just as much as the original grant." That is an authority in point, for it is clear that the true value of the annuity, that is to say, the annuity itself, was that disclosed by both these deeds.

H. Hill was not called upon to reply.

PARKE, B.—If we look to the words of the Act of Parliament itself, which require every deed *whereby* any annuity shall be *granted* to be enrolled, it is clear that a deed cannot be treated as an instrument whereby an annuity is granted, unless the alleged grantor be a party to it. In the present case the second deed cannot in any way whatever be viewed as the grant of an annuity, inasmuch as it was not executed by the grantor of the original annuity, and it therefore cannot be considered as the grant of a fresh annuity. Consequently, it did not require enrolment under this statute, which does not apply except in those cases where the grantor is a party to the deed. The present case may be disposed of upon that short ground. The plaintiff therefore is entitled to judgment.

PLATT, B., and MARTIN, B., concurred.

Judgment for the plaintiff.

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HALDANE v. JOHNSON.

May 9.

THE declaration stated that the plaintiff, by deed, let to the defendant a house and premises, No. 18, &c., to hold for fourteen years from the 25th of December, 1846, at the yearly rent of 105*l*., payable by four equal quarterly payments, upon the 25th of March, the 24th of June, the 29th of September, and the 25th of December; and that the defendant, by the said deed, covenanted with the plaintiff that he would pay to the plaintiff the said rent at the said respective days and times and in manner aforesaid, but the defendant hath broken his said covenant in this, that, although during the said term, to wit, on the 25th of December, A.D. 1852, rent for one quarter of a year of the said term, ending on the day and year last aforesaid, became due and payable, yet the defendant did not pay the same when it became due, or at any time afterwards, and the plaintiff claims 50*l*.

Plea.—That upon Christmas-day, 1852, being the quarter-day on which, &c., the defendant was at and upon the said demised house and premises for the space of one half hour before the setting of the sun on the said day, the same being a sufficient time before sunset to allow of the counting before sunset of the money hereinafter mentioned, and continued there from the said time until, at, and after the setting of the sun on the said day, he being, during all the time last aforesaid, ready and willing to pay the sum of 26*l* 5*s*., being the amount of the said rent in respect of the said demised house and premises, so then due and payable from the defendant to the plaintiff as aforesaid, if the plaintiff had been minded to take and accept the same; but neither the plaintiff, nor any other person on his behalf, came there or was ready there to receive the

It is no answer to an action on a covenant for rent (no particular place for payment being mentioned in the deed) that the defendant was on the premises demised for half an hour before, and continued there to, the setting of the sun, being a sufficient time before sunset to allow of the counting of the money for the rent; and that he was, during that time, ready and willing to pay the rent, if the plaintiff had been minded to take and accept it, but that neither the plaintiff nor any person on his behalf came to receive it; and that from thence hitherto the defendant has been and is ready and willing to pay the same—concluding by payment of the amount into Court.

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same; and that from the said Christmas-day hitherto the defendant has been and still is ready and willing to pay to the plaintiff the said sum of 26*l.* 5*s.*, and he now brings the same into Court, &c.

Demurrer, and joinder.

The demurrer was argued in the present Term (April 25) by

Willes, in support of the demurrer.—The plea affords no answer to the plaintiff's claim. It appears to have been taken from the form given in 3 Chitty on Pleading, 7th edit., vol. 3, p. 235. This plea, however, omits a material allegation to be found in that form, viz. that the defendant *offered* to pay the rent. Upon this ground alone, the plea cannot be supported.—He was then stopped by the Court.

Montague Smith contra.—It could hardly be disputed that this plea would be a good answer to an action of *debt* for the rent. This is not a covenant for the payment of a sum of money in gross, but a covenant for the payment of rent reserved. In Bac. Abr. "Conditions" (P.) 4, it is laid down, that "rent reserved payable yearly is to be paid on the land; so, if a man leases, rendering rent, and the lessee binds himself in 20*l.* to perform the covenants, this does not alter the place of payment of the rent, for it may be tendered on the land without seeking the obligee." It appears from *Johnson v. Clay* (a), that on a bare covenant for the payment of money, the defendant may plead a tender; and although the present plea does not amount to a tender, yet it sets up the readiness and willingness of the defendant to perform his part of the contract by having the money ready to be paid to

(a) 7 Taunt. 486.

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the plaintiff at the place where he has agreed to pay it. [*Willes* referred to *Poole v. Tumbidge* (a), as overruling *Johnson v. Clay*.] The present claim may be considered as in the nature of an action of debt. [*Parke, B.*—It is founded on the covenant. The defendant must go the length of contending that the landlord, in order to obtain his rent, is under the obligation of going upon the land for it.] If the landlord does not go or send for it, he has to blame himself for his loss. [*Martin, B.*—There is a passage in *Sheppard's Touchstone*, p. 378, which seems to be in the defendant's favour. It is there said, "when the thing the party is bound by the condition to do is local, he is not bound to go any further or to any other place, but to the place itself; and therefore, if the condition be to make a feoffment of a piece of land, the party that is bound to do it, is not bound to go to any other place but to the piece of land to do it: and if a man make a feoffment in fee, or lease for life or years of land, rendering rent generally, and gives an obligation with condition for the payment of the rent, the feoffee or lessee is not bound to go to any place from the land to seek the feoffor or lessor to pay him this rent." *Parke, B.*—My impression is, that the authorities which appear to favour the necessity of the landlord's going upon the land, are applicable only to cases of forfeiture and distress.] The present question is discussed by *Bayley, J.*, in his judgment in *Rowe v. Young* (b) where he says, that "rent is reserved in some cases generally, and then the proper place for the payment, the place appointed by law, is the land out of which it issues."

Willes, in reply.—The obligation imposed upon the tenant by his covenant does not involve the necessity of the payment being made upon the land. It is a personal duty

(a) 2 M. & W. 223.

(b) 2 B. & B. 234.

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which the tenant has cast upon himself by his covenant, and it is immaterial whether or not he has the land, for that is not a matter which affects his liability upon the covenant. He is bound to seek out the covenantee and to pay him the amount on the day agreed upon. There is nothing which makes the rent payable upon the land: *Brook, Abr.*, "Tender and Refusal," pl. 20. No authority can be found for saying that such a plea is good to an action on a covenant. The plea is therefore bad for this reason. It is also insufficient by reason of the omission of the "obtulit." This plea would be satisfied by the tenant having had the money securely locked up in his desk whilst he was enjoying the festivities of the season. *Bayley, J.*, in *Rowe v. Young*, after referring to *Kidwelly v. Brand* (a), and *Buskin v. Edwards* (b), says, "The inference, then, to be fairly drawn from the case in *Plowden*, corrected as it is by the case in *Croke Elizabeth*, is this, that if a sum in gross be made payable at a certain time and place, and the sum is properly a debt from the person who is to pay it, it is his duty to attend at the time and place and offer it, but it is not the duty of the person who is to receive it to demand it; and yet the offer is essential to protect him, not against payment of the sum itself (which, as being due, ought to be paid) but against damages." In the following cases, pleas which omitted the averment of a tender by the defendant have been held bad: *Horne v. Lewin* (c), *Cole v. Walton* (d); and the same principle is involved in the decision in *Tinckler v. Prentice* (e). [*M. Smith* referred to *Crouch v. Fastolfe* (f), which was an action of debt for rent upon a lease for years, and a plea similar to the present, omitting the allegation of a tender upon the day for the payment of the rent, was held good on demur-

(a) *Plowd.* 69.

(b) *Cro. Eliz.* 415, 535.

(c) 1 *Ld. Raym.* 639.

(d) 3 *Lev.* 103.

(e) 4 *Taunt.* 549.

(f) *Sir T. Raym.* 418.

rer.] The weight of authority is against the sufficiency of the plea.

Cur. adv. vult.

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The judgment of the Court was now delivered by

MARTIN, B.—This was a demurrer to a plea. The declaration alleged that the plaintiff, by deed, let to the defendant a house, at the rent of 105*l*., payable quarterly on the usual quarter days, and that the defendant covenanted with the plaintiff that he would pay him the said rent at the said respective days and times, and in manner aforesaid; but that the defendant broke his covenant in this, that he did not pay the quarter's rent which fell due on the 25th of December, 1852.

The defendant pleaded that, upon the 25th of December, 1852, he was in the house demised for half an hour before the setting of the sun, being a sufficient time before sunset to allow of the counting of the money for the rent, and from thence until sunset, and during all that time was ready and willing to pay the rent if the plaintiff had been minded to take and accept it, but that neither the plaintiff nor any person on his behalf came to receive it; and that from thence hitherto he was ready and willing to pay it, and he brought the amount into Court ready to be paid to the plaintiff.

To this plea there was a demurrer.

The case was argued before us a few days ago by Mr. *Willes* on behalf of the plaintiff, and Mr. *Montague Smith* on behalf of the defendant; and we are of opinion that the plea is bad.

Several authorities were cited by the learned counsel for the defendant, but none of them support the position which it was necessary to establish in order to maintain the plea, viz. that where a lessee covenants to pay rent (no particular place for payment being mentioned in the deed),

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the readiness of the lessee to pay on the day on the premises demised, is either a performance of the covenant, or an answer to an action upon it, until demand and refusal of payment be made.

Several passages were cited from Coke Littleton, beginning at page 200. They all, however, had reference to *conditions*. There is no doubt that, at common law, in order to entitle a lessor to re-enter, and avoid the estate for forfeiture by breach of a condition for the payment of rent, it is incumbent upon the lessor to demand the rent upon the land on the day when it becomes due, a sufficient time before sunset to enable the payment to be made. This is distinctly laid down in Coke Litt. 201. b., and the statute 6 Geo. 4, c. 28 (re-enacted by the late Common Law Procedure Act), is founded upon the ground that such was the common law. We are, however, clearly of opinion that a covenant for payment of rent, such as is averred in the present case, is an obligation of a character entirely different from, and not at all governed by, the rules of law applicable to conditions and forfeitures.

The case of *Crouch v. Fastolfe* (a) was also cited. The plea now in question is the same as the plea in that case, which was adjudged to be good; but the action there was debt, whilst in the present case the plaintiff's demand is upon a covenant to pay at the time and in manner as reserved, no place for payment being mentioned.

A case of *Buskin v. Edwards*, twice mentioned in Croke Eliz., first in the Queen's Bench, at page 415, and again in error, at page 535, was also cited. It is badly reported; and the distinction between an action for the rent and a right of entry for condition broken does not seem to have been adverted to. It, however, was also an action of

(a) Sir T. Raym. 418.

debt for the rent, and not upon a covenant for the payment of it.

But two other authorities were referred to in the argument, viz. *Rowe v. Young* (a), in the House of Lords, and the judgments of the Judges there, and *Poole v. Tumbridge* (b), which, in our opinion, clearly shews the plea to be bad. The covenant (as has been already observed) is a covenant to pay a sum of money to the lessor on a particular day: no place is mentioned for the payment, either expressly or by implication. In such case it is clearly laid down in both the above cases, that it is the duty of the covenantor to seek, on the appointed day, the person who is to be paid, and pay or tender him the money. And in *Poole v. Tumbridge*, it is stated by *Parke, B.*, as the conclusion from the authorities, "that nothing can discharge a covenant to pay on a certain day but actual payment or tender on that day, although, if the party afterwards choose to receive the money, such payment may be pleaded by way of accord and satisfaction."

This is in exact conformity with the rule of law laid down in *Sheppard's Touchstone*, p. 378, that when an obligation is to pay a sum of money, or do any like transitory thing to the obligee on a day certain, but no place is set down where it shall be done, it must be done to the person of the obligee wheresoever he be, if he be intra quatuor maria.

No precedent was cited for such a plea in an action upon a covenant, and we are satisfied that none exists, otherwise it would have been discovered in the investigation which was made in reference to the case of *Rowe v. Young*, above cited.

In *Comyns' Digest*, title "Pleader" (2 W. 49), page 402,

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(a) 2 B. & B. 165.

(b) 2 M. & W. 223.

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the plea seems to be approved of in the action of debt; but nothing of the kind is to be found in regard to the action on the covenant (2 V. 14, page 360); indeed, on the contrary, there is a passage which shews that even a subsequent levy by distress is not a good answer to an action of covenant for the rent, for (as is said) *this admits the rent not paid on the day.*

We are therefore of opinion, that a covenant for the payment of rent, at the time and in manner as reserved, when no particular place of payment is mentioned, is analogous to a covenant to pay a sum of money in gross on a day certain, in which case it is incumbent upon the covenantor to seek out the person to be paid, and pay or tender him the money, and for the simple reason, that he has contracted so to do.

Our judgment upon the main question being for the plaintiff, it is unnecessary to refer to an objection to the plea of a mere technical character, suggested by Mr. *Willes*.

Judgment for the plaintiff.

1853.

REGINA, on the Prosecution of the DUKE OF BRUNSWICK, v. *May 3.*
LOWE and CLEMENTS.

THIS was a rule calling on the Duke of Brunswick to shew cause why all further proceedings in this case should not be stayed, on the ground of his being an outlaw.

It appeared from the affidavits, that in the year 1849 the Duke of Brunswick obtained judgment for 1760*l.* in an action for libel against the publisher of the Satirist newspaper. In January, 1851, the Duke, upon the fiat of the Attorney-General, issued a scire facias on the recognisances to the Crown entered into by the defendants as sureties for the publisher of the newspaper, pursuant to the 60 Geo. 3, c. 9, s. 8, and 11 Geo. 4 & 1 Will. 4, c. 73, s. 3. The defendants appeared and pleaded to the scire facias; and a demurrer to the plea having been filed on the part of the Duke, the defendants joined in demurrer in Hilary Term, 1852. The Duke afterwards left this country, and, on the 24th of March, 1853, was outlawed for not appearing to answer an indictment for conspiracy and subornation of perjury. His attorney having given notice that an application would be made to the Court to appoint a day for hearing the demurrer, the present rule was obtained. The rule had been served on the Attorney-General as well as the Duke's solicitor.

An outlaw cannot enforce payment of damages recovered in an action of libel by scire facias on the recognisance to the Crown, under the 60 Geo. 3, c. 9, s. 8, and 11 Geo. 4 & 1 Will. 4, c. 73, s. 3; and therefore, where notice of a rule to stay proceedings on the ground of his outlawry was served on the Attorney-General and he did not appear, the Court made the rule absolute.

C. Gray shewed cause, and argued that the case did not fall within the general rule, since it was in fact a proceeding on the part of the Crown, which could not be taken without the Attorney-General's fiat.

Knowles, in support of the rule.—The proceeding, though in the name of the Crown, is for the benefit of the Duke of Brunswick; and it is well established that an outlaw

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cannot be heard in Court, except for the purpose of reversing his outlawry: *Aldridge v. Buller* (a). [Parke, B.—That is not quite true; an outlaw may shew cause against an attachment. It is more correct to say that he cannot enforce any proceeding for his own benefit.] He cannot move to tax an attorney's bill in which he is interested: *In re Mander* (b). It is true, that in *Hamlin v. Crossley* (c) it was decided that an outlaw might apply to the Insolvent Debtors' Court for his discharge from custody under a *capias utlagatum* upon a judgment for damages and costs; but that proceeded on the particular language of the 7 Geo. 4, c. 57, ss. 10, 50 (d). [Parke, B.—The principal object of the proceeding, which is to enforce payment of the damages recovered in an action for libel, is for the benefit of the outlaw. The Crown, no doubt, has an interest in it; because the damages, when recovered, would belong to the Crown and not to the outlaw, who has forfeited all his effects and all his interest in the judgment. But then her Majesty's Attorney-General has been served with the rule and does not appear, which shews that the Crown does not take any interest in the matter.]

PER CURIAM (e).—The rule must be absolute.

(a) 2 M. & W. 412.

(b) 6 Q. B. 867.

(c) 8 A. & E. 677.

(d) The language of the 1 & 2

Vict. c. 110, ss. 35, 79, is the same.

(e) Pollock, C. B., Parke, B.,
Platt, B., and Martin, B.

1853.

GRAFTON and Others v. THE EASTERN COUNTIES RAILWAY
COMPANY.

May 4.

THE declaration stated, that, by certain articles of agreement, bearing date the 30th of October, 1851, the plaintiffs and defendants covenanted and agreed with each other, amongst other things, in manner following: that is to say, that the plaintiffs would, during a certain term of years therein mentioned, supply to the defendants, and that the defendants would take from the said plaintiffs, all the coke the said Company, during the continuance of the said agreement, should require at Lowestoft, equal to the reasonable capacity of certain ovens therein mentioned to manufacture for a certain district therein mentioned, at the price of 18s. 6d. per ton, laden into the said Company's trucks, provided that the said coke should be of the best quality; the said plaintiffs on their part engaging that the same should be large and of the best quality, and equal to that made from the best Brancepeth coal, and to be to the satisfaction of the said Railway Company's inspecting officer for the time being; and agreeing that the said Railway Company should have power to refuse to accept coke of an inferior quality, or small in its pieces, and to purchase what they might require elsewhere, if the plaintiffs did not supply coke of the best quality and equal to that above described, and to the satisfaction of the said Railway Company's said officer, and to charge the plaintiffs with the excess of price beyond the said contract

A declaration stated, that, by a certain contract, the plaintiffs agreed that they would, during a certain term, supply to the defendants, and that the defendants would take from them, all the coke the defendants' Company should require at L., according to the capacity of certain ovens, provided that the said coke should be of the best quality; the plaintiffs on their part engaging that the same should be large, and of the best quality, and equal to that made from the best B. coal, and be to the satisfaction of the said Company's inspecting officer for the time being; and agreeing that the said Company should have power to refuse to accept coke of inferior

quality or small in its pieces; and to purchase what they might require elsewhere if the plaintiffs did not supply coke of the best quality, and equal to that above described, and to the satisfaction of the said Company's said officer, and to charge the plaintiffs with the excess of price beyond the said contract price. The declaration then contained an averment, that, during the term, the plaintiffs manufactured and supplied to the defendants, in the manner provided by the said agreement, certain coke, which they required at L., which was of the quality required by the agreement, and equal to that made from the said B. coal, and large in its pieces; and laid as a breach the refusal of the defendants to accept the said coke:—*Held*, that, according to the true construction of the agreement, it was a condition precedent to the right of the plaintiffs to insist upon the defendants' acceptance of the coke, that it should be to the satisfaction of their inspecting officer; and consequently that the declaration, which omitted that allegation, was bad in substance.

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price. And the plaintiffs say, that, during the said term and continuance of the said agreement, they manufactured and supplied to the defendants in the manner provided by the agreement certain coke which they required at Lowestoft for the said district, which was of the quality required by the agreement, and equal to that made from the said Brancepeth coal, and large in its pieces, and of which the value amounted to the sum of 1100*l.*; but that the defendants then refused to take the same and pay for the same after the rate aforesaid, contrary to the said articles of agreement. And for that, during the said term and the continuance of the said agreement, the plaintiffs manufactured and supplied to the defendants certain other coke, which they refused, at Lowestoft for the said district, according to the said agreement; and which was such coke as the plaintiffs engaged to supply according to the said agreement as aforesaid, and of which the value amounted, at the rate aforesaid, to the sum of 198*l.* 3*s.* 5*d.*, and in all things performed the said agreement on their parts; and although the defendants then accepted and received the said coke, they have thence hitherto refused to pay for the same as aforesaid.

The defendants pleaded to the breach above assigned, secondly, that the plaintiffs did not, during the said term, manufacture and supply to the defendants in the manner provided by the said agreement any coke which they required at Lowestoft for the said district, which was of the quality required by the agreement, and equal to that made from the best Brancepeth coal, and large in its pieces, as in and by that breach above alleged.

The defendants pleaded, thirdly, to the same breach, that no part of such coke was to the satisfaction of the defendants' inspecting officer for the time being; wherefore they refused to accept and pay for the said coke, or any part thereof, as in that breach alleged.

The plaintiffs replied to these pleas, that the coke, upon

the refusal to take and pay for which the first breach is above assigned, was, during the said term, manufactured and supplied to the defendants in the manner provided by the said agreement, and was required at Lowestoft for the said district, and was of the quality required by the said agreement, and equal to that made from the best Brancepeth coal, and large in its pieces.

Demurrer and joinder.

H. T. Holland in support of the demurrer.—The pleadings do not shew any cause of action; for, according to the terms of the agreement between these parties, the coke supplied by the plaintiffs ought to have been “to the satisfaction of the Company’s inspecting officer.” This is a material part of the contract, and is a condition precedent to the plaintiff’s right to recover for coke supplied. In *Milner v. Field* (a), a building agreement contained a proviso, that no instalment should be paid unless the plaintiff delivered to the defendant a certificate signed by the surveyor of the latter that the works were performed according to the specifications; and it was there held, that the certificate was a condition precedent to the right to payment, and that the want of it was a good answer to the action.—He was then stopped by the Court.

Maynard contra.—According to the true construction of this agreement, either the obtaining of the satisfaction of the defendants’ officer is not a condition precedent, or, if it be so, that condition is void. First, the meaning of this clause of the agreement is, that if the coke should not be large, and of the best quality, the Company should have the power to reject it. This is the subject to which the terms “to the satisfaction of the defendants’ officer,” is applicable. The inspecting officer was inserted as a per-

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(a) 5 Exch. 829.

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son well qualified to form a proper opinion as to the quality of the coke supplied. It does not appear by the pleadings that he was dissatisfied, or that, if he was, his dissatisfaction was notified to the plaintiffs; and it does appear that the coke was of the quality stipulated for by the agreement. [*Parke, B.*—This stipulation empowers the Company's officer to reject any coke whatever with which he may be dissatisfied. It is to be presumed that he will not be satisfied with the coke which may not be of the quality specified. The satisfaction of the officer is a condition precedent to the plaintiffs' right to insist upon the Company's acceptance of the coke, and therefore the plaintiffs ought to have inserted an averment to that effect in their declaration.] Secondly.—The condition is void, and is not binding upon the plaintiffs. Here the party upon whose decision the rights of the plaintiffs are made to depend is the servant of the defendants, and consequently they have it in their own power to withhold payment from the plaintiffs. If the party named had been mutually agreed upon as the arbitrator between the parties, the case would have been different. The present case, however, falls within the principle of the decision in *Dallman v. King* (a), where, under an agreement that the lessee should spend a certain sum in repairs, to be inspected and approved of by the lessor, and to be done in a substantial manner, the lessee was to be allowed to retain that amount out of the first year's rent of the premises; it was held that the lessor's approval was not a condition precedent to the lessee's retaining the rent. And the Court there said, that the case was distinguishable from that of *Morgan v. Birnie* (b), where the defendant was to pay for a building, upon receiving an architect's certificate that the work was done to his satisfaction; and the architect having checked the builder's charges, and sent them

(a) 4 Bing. N. C. 105.

(b) 9 Bing. 672.

to the defendant, it was held that that did not amount to such a certificate of satisfaction as to enable the builder to recover, although the defendant had not objected to pay on the ground that no sufficient certificate had been rendered. In the latter case, the architect was appointed by the parties the sole arbitrator in settling the amount to be expended on the premises and all disputes. And in *Harrison v. The Great Northern Railway Company* (a), which is a similar case to the present, *Williams, J.*, says—"There is a difference between the case in which the person who is to certify is made an arbitrator, and the case where he is a servant, to do some act which the Company might order him to do." Upon the defendants' construction of this contract, they have themselves an absolute power of discretion in the matter. [*Martin, B.*—Parties, therefore, ought to be careful how they enter into contracts containing stipulations giving such powers.]

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PER CURIAM (b).—The clause in question is a condition precedent to the plaintiffs' right of action, and is binding upon them. They may amend; otherwise there will be

Judgment for the defendants.

(a) 21 L. J., C. P., 89. (b) *Parke, B., Platt, B., and Martin, B.*

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April 15.

In re PLACE, in a suit of PLACE v. POTTS and Another.

After an action brought by a shipowner against the charterer for freight, a monition was issued out of the Court of Admiralty at the suit of the obligee of a bottomry bond, directing the defendant to pay the amount of the freight (which exceeded the amount secured by the bottomry bond) into the registry of that Court; which the defendant, in obedience to the monition, accordingly did. This Court refused a writ of prohibition to stay all further proceedings in the Court of Admiralty, although the affidavits in support of the application for the writ suggested that the proceedings were conducted collusively, and to defeat the plaintiff's claim.

C. E. POLLOCK moved for a rule calling upon the defendants to shew cause why a writ of prohibition should not issue to prohibit them from further proceeding in the matter of this suit in the Court of Admiralty.—It appeared by the affidavits in support of the motion, that this was an action brought by the plaintiff, the owner of the ship *Brilliant*, against the defendants, the charterers, for freight (a). After the commencement of the action, a monition issued out of the High Court of Admiralty, at the suit of the obligee of a bottomry bond, directing the defendants to pay the amount of the freight (which exceeded that decreed by the bottomry bond) into the registry of that Court, which the defendants, in obedience to that monition, accordingly did. The affidavits further suggested, that there had been collusion in the proceedings in the Admiralty Court, between the obligee of the bottomry bond and the defendants, for the purpose of defeating the plaintiff's claim in the present action.—The plaintiff may sustain a serious injury to his rights, if the proceedings of the Court of Admiralty be not stayed. This Court has seisin of the subject-matter of the plaintiff's claim. [*Parke, B.*—The obligee of the bottomry bond seeks his remedy in the Court of Admiralty, which has jurisdiction over the matter, and can enforce the payment of the money due under that bond. *Martin, B.*—We cannot prohibit a man from seeking his lawful remedy in the proper Court. How can the plaintiff be injured by these proceedings in the Admiralty Court?] That Court may pronounce a judgment in rem, which may, consequently, affect the plaintiff's remedy here; and moreover, it appears by the affidavits, that the proceedings are collusively carried on.

(a) See the next case.

[*Parke*, B.—Have you any authority in support of a prohibition on that ground? If a judgment in rem be obtained, and the defendants should set that up as an answer to the action in this Court, the plaintiff may reply the fraud. *Pollock*, C. B.—If that Court has jurisdiction over the plaintiff's demand, he ought to put in his claim there.]

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POLLOCK, C. B.—If the facts stated in support of the rule were embodied in a declaration in prohibition, the declaration would be bad upon the face of it. There ought, therefore, to be no rule.

PARKE, B., PLATT, B., and MARTIN, B., concurred.

Rule refused.

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THE declaration stated, that "the defendants are indebted to the plaintiff for freight, for the conveyance by the plaintiff for the defendants, at their request, of goods in the ship *Brilliant*; and the plaintiff claims the sum of 521*l.* 7*s.* 5*d.*"

The defendants pleaded, secondly, as to the sum of 386*l.* 17*s.* 9*d.*, parcel of the money claimed, that before the earning or accruing due of the said freight, and before the defendants became indebted in the said 386*l.* 17*s.* 9*d.*, parcel &c., the said goods so conveyed in the said ship, as therein mentioned, were by the defendants shipped in and

It is a good plea to an action for freight, in bar of the further maintenance of the action, that a certain sum of money had been borrowed on a bottomry bond; that the amount had not been paid; and that thereupon, after the commencement of the action, proceedings had been instituted in the

Court of Admiralty for the recovery thereof; and that the defendants had, in pursuance of a monition issued out of that Court, paid the freight into the registry of that Court; although the amount of the freight exceeds that due upon the bottomry bond.

A declaration in an action for freight stated, that "the defendants are indebted to the plaintiff for freight" for the conveyance of goods, &c. :—*Held*, on general demurrer, that the declaration was bad, for not following the form given by the schedule to the Common Law Procedure Act, which contains the words "for money payable by the defendant to the plaintiff," and for not shewing any debt due *in presentia*.

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on board the said ship in parts beyond the seas, to wit, at Quebec, to be conveyed by the plaintiff in the said ship, for freight and reward to the plaintiff in that behalf, on a voyage from Quebec aforesaid to Sunderland in this kingdom, and there delivered by the plaintiff for the defendants, the dangers and accidents of the seas and navigation of whatsoever nature or kind excepted; and that, whilst the said ship was in parts beyond the seas, to wit, at Quebec aforesaid, and before the commencement of the said voyage, it became and was absolutely necessary that one Thomas Place, the master of the said ship, as agent for and on behalf of the plaintiff and other the owner or owners of the said ship, should borrow a certain sum of money for the use of the said ship and the purposes of the said voyage, upon the credit of the said ship and the freight, upon a bottomry bond.—The plea then set out a bottomry bond in the usual form, pledging the ship and freight to one George Burns Symes for the sum of 286*l.* 16*s.* 6*d.*, and then proceeded to state, that the plaintiff did not, nor did the said T. Place, nor did any other person, pay to the said G. B. Symes the said sum of 286*l.* 16*s.* 6*d.*, and the same remains wholly due and unpaid; and, by reason of the nonpayment of the same, the said G. B. Symes, in due form of law, after the commencement of this action, took proceedings and made suit in the High Court of Her Majesty's Admiralty of England against the said ship and freight, to recover payment of the said sum; and afterwards a monition and process issued out of the said Court of Admiralty under the Great Seal thereof, directed to all and singular her Majesty's vice-admirals, justices of the peace, mayors, sheriffs, bailiffs, marshals, constables, and to all other her Majesty's officers, ministers, and others, as well within liberties and franchises as without; and whereby, after reciting, amongst other things, that the Right Hon. Stephen Lushington, Doctor of Laws, Lieutenant of the said High Court of Admiralty, and in the same Court off-

cial principal, and commissary-general, and special and president and judge thereof, lawfully constituted and appointed, in a certain business moved and prosecuted before him in the said Court on behalf of T. H. Holderness of Liverpool, in the county of Lancaster, merchant, the lawfully constituted attorney of the said G. B. Symes, the legal holder of the said deed or bottomry bond on the said ship and the freight, due for the transportation of the said goods lately laden therein, rightly and duly proceeding on the day of the date of the said monition or process, at the petition of the proctor of the said T. H. Holderness, who alleged the said freight to be in the possession or power of the defendants, decreed monition against the plaintiff and T. Fordyce, and the defendants, to the effect and in manner and form thereafter mentioned (justice so requiring), our Lady the Queen did, by the said monition and process, strictly charge and command them jointly and severally, that they should omit not by reason of any liberty or franchise, but that they should monish and cite, or cause to be monished and cited, peremptorily and personally, the said plaintiff and T. Fordyce, that, on or before the bye-day after Hilary Term, to wit, Tuesday, the 15th of February, 1853, they should bring or cause to be brought into the registry of the said Court, situate in the parish of St. Gregory, near Doctors Commons, London, the sum of 157*l.* 6*s.* 6*d.*, the balance of proceeds arising from the sale of the wreck and stores of the said ship, to abide the judgment of the Court concerning the said deed or bottomry bond, or appear before the said Judge of the said Court, or his surrogate, to an action to be entered on behalf of the said T. H. Holderness against the said balance of proceeds and freight in respect of the said deed or bottomry bond, and give bail to answer such action, so far as regards such balance of proceeds, or to appear and shew good and sufficient cause concludent in law why they should not bring the said sum into the said registry, or

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why they should not give such bail; and further to do and receive as unto law and justice should appertain, under pain of the law and contempt thereof; and further, that they monish and cite, or cause to be monished and cited, peremptorily and personally, the defendants, whom also our said Lady the Queen monished and cited by the said monition and process, that on or before the said day they should bring or cause to be brought into the said registry the aforesaid money, due for the said freight so earned as aforesaid, to abide the judgment of the said Court concerning the said deed or bottomry bond, together with an account of the said freight duly verified, or appear before the Judge of the said Court or his surrogate, and shew good and sufficient cause concludent in law why they should not bring such sum into the said registry, and further to do and receive as unto law and justice should appertain, under pain of the law and contempt thereof; and that they duly certify to her Majesty's aforesaid Judge or his surrogate what they should do in the premises, together with the said monition or process; and the defendants were accordingly, after the commencement of this suit, monished and cited by the said monition or process, as therein mentioned. And the defendants being unable to shew, and there not being any good or sufficient cause concludent in law, why they should not bring the said sum due for freight into the said registry, as required by the said monition and process, they the defendants did, in obedience thereto, after the commencement of this action, pay, and were forced and compelled to pay, into the registry of the said Court the said sum of 386*l.* 17*s.* 9*d.*, parcel &c., due for the said freight, the same being the whole amount of the money which ever became due and payable for and in respect of the said freight, to abide the judgment of the said Court concerning the said deed or bottomry bond, together with an account of the said freight duly verified.

General demurrer, and joinder. —The defendants, in their points for argument, gave notice that they should object to the sufficiency of the declaration, “on the ground that it does not shew that there was any money payable by the defendants to the plaintiff, and for that it merely alleges that the defendants are indebted to the plaintiff for freight.”

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The case was argued in the present Term (April 25 and 27) by

C. E. Pollock in support of the demurrer to the plea.—The defendants’ objection to the sufficiency of the declaration cannot be sustained. The objection is, that the words “money payable by the defendant to the plaintiff” are omitted in the declaration. These words are to be found in the form contained in the Schedule (B.) to the Common Law Procedure Act, 15 & 16 Vict. c. 76. The 91st section of that Act, after a heading, which recites, that “it is desirable that examples should be given of the statements of causes of action, and of forms of pleading,” enacts that “the forms contained in the Schedule (B.) to this Act annexed shall be sufficient, and those and the like forms may be used with such modifications as may be necessary to meet the facts of the case; but nothing herein contained shall render it erroneous or irregular to depart from the letter of such forms, so long as the substance is expressed without prolixity.” The plaintiff has substantially followed the form, and the defendants have pleaded over. The declaration alleges that the defendants are *indebted* for freight. [*Parke, B.*—The declaration, as it stands, does not contain any cause of action; for it does not appear that it is a money payment, or, what is the more important objection, that the amount claimed is payable in præsent. It may be that the debt does not become payable until three months after action brought. The plaintiff, upon this declaration, would not be bound to prove that

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the debt was due.] The words "for money payable" are equally ambiguous, and do not necessarily imply that the debt is absolutely due. [*Martin*, B.—The Act expressly gives the form, and the pleader ought to have followed that form.]—The Court then asked *C. E. Pollock* whether he would amend, and he applied to do so under the 222nd section of the Act.

The Court thereupon asked *Bramwell*, who appeared for the defendants, whether he had any objection to the amendment; and upon his replying that he had not, the declaration was amended by the insertion of the omitted words, and the argument proceeded.

The plea affords no answer to the action. First, the proceedings in the Admiralty Court are not of the same character as the proceedings in the superior Courts. In the one case, the proceedings are in rem, in the other they are in personam: and secondly, the parties in the Admiralty suit are not the same as those in the present action. The proceedings in the Court of Admiralty are in the nature of a monition and not of an attachment, and cannot affect the plaintiff's claim. The sum due on the bottomry bond is much less than that claimed, and admitted by the defendants to be due for freight. The plea at the best discloses only ground for the suspension of the suit, and that matter cannot be made the subject of a plea in bar. The defendants' remedy is by application to the equitable jurisdiction of the Court. In the case of *Harmer v. Bell* (a), in which it was held that the liability to make compensation for injury done by a vessel at sea, remained attached to the vessel, although it had been transferred to a third party; and the distinction between a proceeding in rem and one in personam is pointed out. *Jervis*, C. J., in delivering the judgment of the Court, says:—"The remaining point may be disposed of in a few words. The pleadings

(a) 7 Moore P. C. 267.

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shew that the proceedings in Scotland were commenced by process against the persons of the defendants; and that the seizure of the vessel was collateral to that proceeding, for the mere purpose of securing the debt. We have already explained that, in our judgment, a proceeding in rem differs from one in personam; and it follows that, the two suits being in their nature different, the pendency of the one cannot be pleaded in suspension of the other." There is no analogy between the proceedings in the Court of Admiralty and those by foreign attachment in the city of London, as is also pointed out in the preceding case; and upon the assumption that such an analogy did exist, the proceedings in the Lord Mayor's Court, in order to afford an answer to the action in the superior Court, must have been commenced before the date of the action. In *Babington v. Babington* (a), it was held that a foreign attachment after appearance is no plea in debt. So in *Humphrey v. Barns* (b), it was also held, that the plea of foreign attachment must shew it to be parcel of the demand; and if it was obtained pendente lite, it is bad. Upon this point, *Brook v. Smith* (c), *Pell v. Pell* (d), *Verrall v. Robinson* (e), may be referred to. In the later case of *Webb v. Hurrell* (f), in which there was a plea of foreign attachment, the plea alleged that the plaint was levied in the Lord Mayor's Court before the commencement of the suit, which gave that Court seisin in the matter, the writ being in the nature of interlocutory judgment.—Secondly, the parties in the Court of Admiralty are not the same as the parties in this suit. The two proceedings are therefore not ad idem, although the subject-matter may be so. In *Reeve v. Dalby* (g) it was held, that a suit by husband and wife against the trustees of the latter's separate property, could

(a) Cro. Eliz. 157.

(b) Cro. Eliz. 691.

(c) 1 Salk. 280.

(d) Cro. Eliz. 101.

(e) 2 C. M. & R. 495.

(f) 4 C. B. 287.

(g) 2 Sim. & S. 464.

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not be pleaded in bar to a subsequent suit by her and her next friend against her trustees and husband, although the relief prayed in both suits was the same. [*Parke*, B., referred to *Beardshaw v. Lord Londesborough* (a), in which a plea to an action for money had and received, that proceedings had been taken in Chancery under the Winding-up Act, was held bad, as shewing matter in suspension only of the action.]

Bramwell contra.—The plea affords a good defence in law to this action. The case of *Beardshaw v. Lord Londesborough* turned upon the precise words of a particular Act of Parliament. It is conceded, that if the subject matter of the plea goes in suspension only of the action, the plea cannot be supported. It is however contended that this is a good plea in bar to the further maintenance of the action. The question may be treated in the first place as if the matters pleaded had arisen before action brought. Now the bottomry bond creates a lien upon the vessel, without including or requiring possession of it; and the privilege or claim thus created is enforceable by the party entitled, by the process of the Court of Admiralty. That Court treats the freight as an actuality. The proceedings are against the ship; and the Court having obtained possession of it, the parties come in, and the Court has power to order the freight or the surplus to be paid to the party entitled to it. The moment, therefore, the money which is to settle the question of the payment of the freight finds its way, under the process of the Court of Admiralty, into that Court, an answer is thereby furnished to an action like the present. The monition is an initiatory proceeding to get possession of the *thing*, and then to get the parties into Court. As far as the defendants are concerned, this is not the case of an action pending. The money has

(a) 2 L. M. & P. 560.

been taken out of their hands, and therefore, as far as they are concerned, the matter is concluded. [*Martin*, B.—Suppose the bottomry bond to be bad upon the face of it?] Still, as the Court of Admiralty is a court of competent jurisdiction, the defendants are bound to obey its process. In *Harmer v. Bell* (a) this was admitted; and the judgment of the Court in that case clearly shews that the title of the obligee of the bottomry bond takes precedence of the title of the party to whom the freight is payable. The Court of Admiralty having general jurisdiction of the res subjecta, and having obtained possession of that res, the defendants have thereby acquired a good answer to the plaintiff's claim in this Court. The following authority and cases may be referred to as shewing that this Court is bound to take cognizance of the jurisdiction of the Court of Admiralty: 2 Bac. Abr. "Court of Admiralty," p. 506; *Menetone v. Gibbons* (b), *Ladbroke v. Crickett* (c), *Broom's case* (d). In *Benson v. Chapman* (e), which was an action by the plaintiff on a policy of insurance on freight, *Alderson*, B., in delivering the opinion of the Judges in the House of Lords, says:—"We have no doubt that the receipt of the freight by the obligee of the bond was in law a receipt by the plaintiff." [*Parke*, B.—The whole question depends upon the extent of the jurisdiction of the Court of Admiralty; and no doubt we are bound to take judicial cognizance of the mode in which that Court disposes of the proceeds of the freight. If they have a general jurisdiction to order it to be paid over to the party entitled to it, and not to return it to the party who paid it into the registry, the plea is good. *Platt*, B.—In *Abbott on Shipping*, p. 105, it is said—"that it has been held that this Act," meaning the 3 & 4 Vict. c. 65, "which relieves the Court of Admiralty from all obstacles in respect of mortgages, gives it

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(a) 7 Moore P. C. 267.

(d) 1 Salk. 32.

(b) 3 T. R. 267.

(e) 8 C. B. 950.

(c) 2 T. R. 649.

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power over the freight as well as the ship," referring to the case of *The Dowthorpe* (a).] [*C. E. Pollock*.—That Act and a later one, the 9 & 10 Vict. c. 99, were passed to obviate the difficulties which had arisen from the older decisions, in which it had been held that the jurisdiction of the Court of Admiralty depended upon its possessory right.] Lastly, the plea is a good plea in bar to the further maintenance of the action, since, under the 66th and 68th sections of the Common Law Procedure Act, no formal commencement or conclusion to a plea is required; but the defence may be pleaded according to the fact.

C. E. Pollock, in reply, contended that, although the jurisdiction of the Court of Admiralty extended to questions in which the title to prizes was involved, still the jurisdiction did not extend generally to questions of title in other matters relating to ships: *Haly v. Goodson* (b); and that it did not extend to the title to the freight.

Cur. adv. vult.

PARKE, B., now said—This was an action for freight. The declaration was wrong in substance as it stood at first, and was bad on general demurrer, for not complying with the form given by the new Act; for the declaration ought to have averred that the debt was a money debt, and that it was payable before the commencement of the suit. But it was amended at the time of the argument by consent, and was correct as amended, according to the new form. There was a demurrer to the plea, which was as follows [His Lordship stated the plea, and proceeded:]—The validity of the plea depends entirely upon the nature of the proceedings in the Court of Admiralty, and of those proceedings we are bound by law to take notice; in other

(a) 2 W. Rob. 73.

(b) 2 Meriv. 77.

words, we must acquaint ourselves with the jurisdiction of that Court, by application to the books and proper authorities, and this we have done. Now, if the effect of payment of freight into that Court by virtue of and in pursuance of a monition, is merely to suspend the remedy of the owner of the ship for freight, until that Court shall have decided the question on the bottomry bond, (in which case, they would hand over either the whole of the freight, or so much of it as would be more than sufficient to satisfy the bond if it were good, to the party paying it,) the plea would be in suspension of the action only and consequently bad, inasmuch as there cannot be such a plea. For if the nature of the case is such as to make it right that the cause of action should be suspended, and consequently such as to demand the interference of another Court, the remedy would be by application to its equitable jurisdiction. If, however, the effect of the payment of freight into the Court of Admiralty is to enable that Court to adjudicate upon the freight, and if it has jurisdiction to adjudicate upon all questions respecting the freight as soon as the question of the bottomry bond has been determined; and if it has power to decide the claim as between the owner of the vessel and the party indebted to him for it, or as between the owner of the vessel and the charterer (as the case may be) then the plea is good. We have taken an opportunity of informing ourselves, by inquiring in the best quarter on this subject, what the jurisdiction of the Court of Admiralty is; and it appears that it has jurisdiction to settle all questions with respect to either the whole or the surplus freight. We have communicated with Dr. *Lushington* upon the subject, and we have obtained his answer upon it. There is a case in 2 W. Rob. Adm. Rep., page 73 (a), in point upon this subject, where it is stated that the jurisdiction of the

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Court of Admiralty is to decide every question respecting the freight, both as to the validity of the bottomry bond, and as to the question, whether the defendant was bound to pay the surplus of freight or not to the shipowner afterwards. The plea, in substance, is in bar to the further maintenance of the action; and, since the Common Law Procedure Act, a formal commencement or conclusion to a plea in such case is no longer necessary; but we must give judgment according to the substance of the plea; and as we are of opinion that the plea is good, the judgment of the Court upon this demurrer is,—that the further maintenance of this action by the plaintiff is barred.

Judgment for the defendant accordingly.

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FORSYTH v. BRISTOWE.

A deed by which the mortgagor conveyed the equity of redemption, after reciting the mortgage-deed, contained a recital that the principal sum still remained due, *all the interest thereon having been paid up to the date thereof.* The deed also contained a coven-

THE first count of the declaration was in covenant upon a mortgage deed of the 1st of May, 1830, for the payment to the plaintiff of the sum of 1200*l.* and interest, on the 1st of November, 1830. The second count was on a covenant in a deed of further charge of the 2nd of October, 1830, for the payment of 300*l.* and interest on the 2nd of April, 1831. The third and fourth counts were upon two bonds, given respectively to secure the amounts mentioned in the first and second deeds.

The defendant pleaded the Statute of Limitations to each covenant by the assignee of the equity of redemption to pay the principal sum and interest thereon:—*Held*, in an action by the mortgagee against the mortgagor upon the mortgage-deed, that the recital in the deed of conveyance, which was made within twenty years of action brought, was evidence of the payment of interest on the mortgage debt, so as to take the case out of the Statute of Limitations—3 & 4 Will. 4, c. 42, s. 5, and 7 Will. 4 & 1 Vict. c. 28.

Held, also, that the subsequent payment of interest by the assignee of the equity of redemption was payment by the “agent” of the mortgagor within the meaning of the statute.

Quære, whether the “acknowledgment” required to take the case out of the statute 3 & 4 Will. 4, c. 42, s. 5, must be an acknowledgment made to the creditor or his agent.

of these counts, viz. that the cause of action did not accrue within twenty years. The plaintiff replied to each of these pleas, first, that the defendant made an acknowledgment by writing signed by him, that the said debt was due, and that the action was brought within twenty years after such acknowledgment; and secondly, that the defendant made an acknowledgment by part payment of interest, and that the action was brought within twenty years after such part payment.

At the trial, before *Martin, B.*, at the last Liverpool Assizes, the plaintiff, in support of his replication, gave in evidence a deed, dated the 15th of November, 1833, executed by the defendant, by which he conveyed to one Thompson the equity of redemption in the mortgaged premises. This instrument, after reciting the two mortgage-deeds, contained a recital that the two principal sums of 1200*l.* and 300*l.* still remained due upon and by virtue of the said recited deeds of mortgage and further charge, all interest thereon having been paid up to the date of the said deed. It then contained a covenant on the part of Thompson to pay all interest due on the mortgage from that date. It also appeared, by the evidence adduced, that the interest had been regularly paid up to the commencement of the suit. The writ was issued prior to the 30th of October, 1852.

It was contended, on the part of the defendant, that neither of the replications was supported. A verdict was entered for the plaintiff, with 1600*l.* damages, leave being reserved to the defendant to move to set that verdict aside, and to enter a verdict for him.

Hugh Hill moved accordingly (April 20).—First, the acknowledgment contained in the deed of conveyance was not sufficient to take the case out of the Statute of Limitations, not having been made to the party entitled to the principal money. This precise point was before this

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Court in the case of *Howcutt v. Bonser* (a); but the decision proceeded upon the ground that the acknowledgment relied upon did not necessarily amount to the admission of an existing debt; and with reference to the present point, the Court say, "We are not called upon to say how far the principle of the cases, which have decided that an acknowledgment to third persons is not sufficient, in actions on simple contracts, to take a debt out of the operation of the old Statute of Limitations, 21 Jac. 1, is applicable to the new Statute of Limitations as to debts by specialty." If the case falls within the 3 & 4 Will. 4, c. 27, s. 40, as being an action on a *mortgage*, by the express words of that section, an acknowledgment to a party other than the party entitled to the principal is not sufficient. That section, in substance, enacts, that no action, &c., shall be brought to recover any sum of money secured by any mortgage, or otherwise charged upon or payable out of any land or rent, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, *to the person entitled thereto, or his agent,*" &c. If the case falls within the 3 & 4 Will. 4, c. 42, s. 5, which requires an acknowledgment or part payment &c. to take the case out of the statute in an action on a specialty debt, the term "acknowledgment" is to be read as expounded by the preceding statute 3 & 4 Will. 4, c. 27, s. 4, the two statutes being *pari materiâ*; and the same word being used in both, the signification of it in the prior Act is to be taken as a le-

(a) 3 Exch. 491.

gislative exposition of its meaning in the latter Act: per *Buller, J.*, in *King v. Smith* (a), *Gale v. Laurie* (b). [*Parke, B.*—We think that sufficient has been said upon this point to entitle the defendant to a rule nisi upon it; but if the opinion of the Court should be unfavourable to him upon the second, the rule would be no advantage to him.]

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Secondly.—The payment of interest by the assignee of the equity of redemption was not sufficient to take the case out of the statute. The payment is required to be made either by the mortgagor or by his agent. It may be admitted, that such payment is sufficient to keep alive the liability as against the land, under the 3 & 4 Will. 4, c. 27, s. 40: *Lord St. John v. Boughton* (c), *Grenfell v. Girdlestone* (d). But the payment has not that effect upon the personal liability created by the deeds. A subsequent ratification by the mortgagor would be necessary, and without such ratification the payment is made by a mere stranger, for the fact of the party being the assignee of the reversion does not per se make him the agent of the mortgagor for this purpose. The mortgagor may refuse to ratify the act, Co. Litt. 206. b.; and moreover, the payment cannot be considered as payment of interest, it being the mere satisfaction of that which was payable as interest under the original mortgage, and, as such, payable at the end of six months from its date; and the subsequent payments were made in satisfaction of the damages accruing by reason of the non-payment of the principal. The payments, therefore, made by the assignee of the equity of redemption cannot be regarded as the payment of *interest* within the true meaning of that term, as contained in these statutes.

Cur. adv. vult.

(a) 4 T. R. 419.

(b) 5 B. & C. 156.

(c) 2 Sim. 219.

(d) 2 Y. & C. 662.

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The judgment of the Court was now delivered by

PARKE, B.—In this case Mr. *Hill* moved for a rule nisi to enter a verdict for the defendant, on a point reserved in an action on a mortgage deed and mortgage bonds, tried before my Brother *Martin* at Liverpool.

We think the rule ought not to be granted.

The declaration was in covenant on a mortgage deed, to pay 1200*l.* and interest on the 1st November, 1830. The second, to pay 300*l.* and interest on the 27th April, 1831, and on two mortgage bonds setting out the conditions to secure the same amounts.

There were pleas of the Statute of Limitations; and replications:—First, that the defendant within twenty years made an acknowledgment in writing;—Secondly, that interest was paid within twenty years before the commencement of the suit.

The plaintiff put in evidence a conveyance of the equity of redemption from the defendant to one Thompson, dated the 15th of November, 1833, and which was within twenty years before the commencement of the suit. That conveyance recites, that both the sums of 1200*l.* and 300*l.* still remain due and owing, all interest for the same having been paid up to that date; and thereupon Thompson covenants to pay the interest due on the mortgage from that date; and it was proved that it had been regularly paid ever since.

The plaintiff, on the trial, insisted that this deed and the proof of payment supported both the replications: the first, because it was an acknowledgment in writing, signed by the party liable, of the right of the plaintiff, the mortgagee, thereto; the second, because it was evidence of the payment of interest, and also that the subsequent payment of interest by the assignee of the equity of redemption was a payment of interest within the meaning of the statute.

As to the first replication, on the part of the defendant

it was insisted that, to take the case out of the operation of the statute, not merely an acknowledgment in writing signed by the party or his agent, which would satisfy the requirements of the 3 & 4 Will. 4, c. 42, s. 5, but an acknowledgment to the party or his agent, was necessary, because this was money secured by a *mortgage*, and therefore it was said the case fell within the 3 & 4 Will. 4, c. 27, s. 40; and in this deed the acknowledgment is made to the other party to the deed, not to the mortgagee.

It may be a question whether this section applies to any but remedies against the realty, and therefore, whether it extends to actions on covenant to pay mortgage money or bonds to secure the payment of it. If it does, the general provision of the 3 & 4 Will. 4, c. 42, s. 5, is not inconsistent with this provision, and the law would be, that if an action of covenant or debt be brought on a mortgage deed, or debt on a mortgage bond, and the plaintiff seeks to take the case out of the operation of the statute by an acknowledgment in writing signed by the party liable or his agent, it must be made to the person entitled to the money or his agent; but if it be on an ordinary covenant to pay money, or on a bond, an acknowledgment made by the party liable or his agent, though not made to the party entitled or his agent, would be sufficient.

It is, however, unnecessary to decide this point; because we are clearly of opinion that the plaintiff is entitled to a verdict on the second replication, that interest on the mortgage debt has been paid within twenty years before the commencement of the suit.

In the first place, the deed furnishes ample evidence that all interest was paid up to the date; for that fact is expressly recited, and the date is within the twenty years.

It cannot mean, as insisted on by Mr. *Hill*, that the interest was that which was reserved by the original mort-

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gage, payable *as such* at the end of six months, and which alone could be recovered as interest *eo nomine* in an action of debt; but it must mean that all the interest which would be recoverable in debt, or in covenant, as damages (which is in common parlance interest), had been paid.

All interest is said to be paid up, and all interest from the date of that deed is to be paid by the assignee of the equity of redemption.

"All interest" up to and since the deed, must mean interest in the popular sense, and the payment of this description of interest gives a fresh period of twenty years under the stat. 3 & 4 Will. 4, cc. 27 & 42, and the 7 Will. 4 & 1 Vict. c. 28.

It is impossible to suppose that these statutes mean to give the additional twenty years in consequence of the payment only of the interest properly so called, and usually payable at the end of six months.

There is, therefore, clearly sufficient evidence that this interest was all paid up to the 15th of November, 1833, and consequently within twenty years before the commencement of this suit.

To this it may be added, that the payment ever since of interest by the assignee of the equity of redemption is clearly payment of interest, and the statute does not expressly require that it shall be made by the party liable, or his agent; and if it implies it, the assignee of the equity of redemption who covenants to pay is sufficiently an agent for that purpose. The verdict must therefore be entered on the second replication for the plaintiff. The verdict on the first may be for the defendant.

Rule refused.

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AUSTIN v. MILLS.

May 9.

IN this case *T. Jones*, on a former day in the present Term, had obtained a rule calling on the plaintiff to shew cause why the defendant should not be let in to plead to this action, and why he should not be discharged out of custody.

It appeared by the affidavits, that the action was upon a judgment recovered in a county court. The writ was specially indorsed under the Common Law Procedure Act, 15 & 16 Vict. c. 76, and judgment had been signed under the 27th section of that Act, on the non-appearance of the defendant. Prior to the signing of judgment the defendant was arrested by virtue of a Judge's order, obtained under the 1 & 2 Vict. c. 110, upon the ground that the defendant was about to quit England. Shortly after judgment was signed, the Court of Queen's Bench decided, in the case of *Berkeley v. Elderkin* (a), that an action would not lie on the judgment of a county court. The defendant thereupon gave the plaintiff notice, and in the present Term he obtained the above rule.

Atherton and *Unthank* shewed cause.—The defendant is not entitled to this application upon the present affidavits, which, although they disclose a defence, do not disclose a defence upon the merits. For this is one which cannot strictly be called an honest defence. He has allowed judgment to go against him by his own laches; and if the Court grants the present application, it ought to do so upon the condition that the defendant pays the amount of the debt, which is in fact due, and the costs. The application is to the equitable jurisdiction of the Court; and

An action was brought upon a judgment of a county court, and the writ being specially indorsed under the provisions of the Common Law Procedure Act, judgment was signed under the 27th section. Prior to judgment being signed, the defendant was arrested under a Judge's order, under the 1 & 2 Vict. c. 110, and detained in custody. Subsequently to the signing of judgment, the Court of Queen's Bench decided that an action would not lie on a judgment of a county court; and the defendant thereupon applied to this Court to be allowed to plead to the action, and to be discharged out of custody. The Court refused to grant the application, except upon the condition that the defendant would either give bail or pay the amount of the debt and costs into Court.

(a) 1 E. & B. 805.

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therefore, admitting the decision of the Court of Queen's Bench to be correct, and binding upon this Court, the defendant ought to render equity to the plaintiff for the favour which he now asks.

T. Jones in support of the rule.—[*Parke, B.*—The defendant may be released upon giving bail.] The Court has no jurisdiction to retain the defendant in custody for a debt which he does not owe. The case of *Berkeley v. Elderkin* is an express decision to the effect that there is no cause of action disclosed upon the face of these proceedings; and therefore, if this Court should hold that the defendant is rightly detained, it will in effect reverse that decision. [*Alderson, B.*—The defendant is in custody with a judgment standing against him. You ask us to release him upon such terms as are equitable. Why should not the defendant give security for the amount of the debt and costs? Surely these are equitable terms.] The existence of a debt is a condition precedent to the authority of the Court to detain the defendant in custody.

• • *PARKE, B.*—If this application were the same as the case in the Queen's Bench, we should listen to it in deference to that decision. But it is not so. The defendant is in mercy, and comes to this Court to be relieved from a judgment which has been signed against him. It would appear from the affidavits that he is competent to pay the amount; and we all think that, in order to obtain his release, he must either pay into Court a sum sufficient to cover the amount of the debt and costs, or find bail; in which case he will be let in to demur to the declaration; and if on the demurrer there should be judgment for him, he will obtain his discharge; or if judgment should be for the plaintiff, he may then obtain the opinion of a Court of error upon the point.

ALDERSON, B.—Mr. *Jones*, in fact, asks us to relieve his client upon such terms as shall seem to us to be equitable; and we think that these terms are so.

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PLATT, B., and MARTIN, B., concurred.

The Court said, that if the defendant complied with the conditions proposed, the rule would be absolute, otherwise

Rule discharged.

THOM v. BIGLAND and Others.

April 18.

THE declaration stated, that the defendants falsely and fraudulently deceived the plaintiff in this, that the defendants, as the brokers of the plaintiff, employed by him to purchase certain oil, falsely represented to him that they had purchased for him and on his account twenty-five tons of palm oil, to arrive by the *Celma*, at the price of 30*l.* per ton; by reason of which false representation, he, the plaintiff, believing that the said twenty-five tons of palm-oil had been so bought and would be duly delivered to him in accordance with the terms aforesaid, entered into certain contracts for the sale of soap, and did not purchase the like quantity of other palm oil, as he might

A declaration stated that the defendants *falsely and fraudulently* deceived the plaintiff in this, that the defendants, as brokers of the plaintiff, employed by him to purchase certain oil, *falsely represented* to him that they had purchased for him twenty-five tons of palm oil, to arrive by the *Celma*, at the price of 30*l.*

per ton; by reason of which false representation, the plaintiff, believing that the said twenty-five tons of palm oil had been so bought, and would be delivered to him in accordance with the terms aforesaid, entered into certain contracts, &c., whereas the defendants had not purchased the said quantity of palm oil, or any palm oil, by the *Celma*, on the terms aforesaid, but on different terms, viz. that the said twenty-five tons were sold and would be delivered to the plaintiff after and subject to the prior delivery of 800 tons of palm oil from the said vessel. The declaration then proceeded to state that, by reason of the vessel not having more than 800 tons of the said palm oil on board, no part of the said twenty-five tons could be delivered to the plaintiff, whereby he was obliged to purchase a like quantity of palm oil at other places at a higher price:—*Held*, that, as the declaration was founded upon deceit, in the absence of fraud, the action could not be sustained.

Quære, whether the law merchant imposes the duty upon the broker of giving a true account of his purchases to his principal in all cases?

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and would otherwise have done, and at the then market price of the day, such quantity being required by him for the purposes of the said contracts for the sale of soap, and of his trade and business as a manufacturer of soap; whereas in fact the defendants had not purchased the said quantity of palm oil, or any palm oil, by the Celma, on the terms aforesaid, but on different terms, namely, that the said twenty-five tons were sold and would be delivered to the plaintiff after and subject to the prior delivery of 800 tons of palm oil from the said vessel; and the plaintiff says, that, by reason of the said vessel not having more than 800 tons of the said palm oil on board, no part of the said twenty-five tons was or could be delivered to him, the plaintiff; whereby and by reason of his requiring the said palm oil, and not having purchased the same elsewhere, upon the faith of the said false representation, he, the plaintiff, was obliged to purchase, and did afterwards purchase, a like quantity of palm oil at a much higher price, being the then current price of the day, and was, by means of the premises, otherwise damnified, &c.

Plea, not guilty, and issue thereon.

At the trial, before *Martin*, B., at the last Liverpool Assizes, the following appeared to be the facts of the case. The plaintiff carried on business as a soap manufacturer at Pendleton, near Manchester, and the defendants were brokers at Liverpool, and had been employed in that capacity by the plaintiff to make purchases of palm oil for him. On the 9th of October, 1852, the plaintiff, being in want of some palm oil, wrote as follows to the defendants:—"I want twenty-five tons of palm oil when it is at a low figure" On the same day the defendants replied by letter, in which they described the then state of the market. On the 11th of October, the defendants wrote to the plaintiff two letters, which in substance were the same, one to the plaintiff at Pendleton, and the other to him at Glasgow, where it was supposed he was upon business. These letters con-

tained the following passage:—"We have now to advise of our having purchased for you twenty-five tons of first quality palm oil on the spot at 25*l*. 15*s*., which we are forwarding to you as usual, and we have also bought for you twenty-five tons, to arrive per *Celma*, at 30*l*. The *Ellen Olivia* will arrive in about six weeks, and the *Celma* some time about the end of the year." The letters concluded by stating that the defendants thought they had done the best for the plaintiff's interest. On the 13th of October, the plaintiff wrote to the defendants to say that he would take the 50 tons which the defendants had bought, to arrive by the *Ellen Olivia* and *Celma*. On the 27th of November the defendants wrote to the plaintiff as follows:—"The *Celma*, out of which vessel your twenty-five tons was sold, has arrived to-day. She is reported she is not quite full; and as your twenty-five tons was sold, say after the delivery of 850 tons previously sold, there may not be that quantity on board; but as she turned out last voyage 910 tons, we hope to get you your full quantity. However, we will write you early in the week more fully on the subject, when it will be known what quantity she really has." On the 30th of November the plaintiff wrote to the defendants, pressing for the oil; in answer to which letter the defendants replied that they were afraid they should not be able to obtain the oil; and on the 9th of December, the defendants wrote to the plaintiff that they regretted to say that the *Celma* did not turn out more than 800 tons, and that the plaintiff could not have the oil at 30*l*. per ton; but that they might be enabled to buy twenty tons out of her at 34*l*. 10*s*.

The bought note, which was in the following form, and signed by the defendants, was not sent by them to the plaintiff until after the correspondence had taken place.

"Mr. D. Thom, "Liverpool, 11th October, 1852.

"We have this day bought on your account from C.

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Horsfall & Sons, the following goods, viz. twenty-five tons dry merchantable palm oil, to arrive by Celma, at 30*l.* per ton, after delivery of 850 tons previously sold, in regular casks from the Quay, which, when empty, are to be returned and paid for about 25*s.* per ton nett."

It was admitted, on the part of the plaintiff, that the defendants had not been guilty of any fraudulent intention in the transaction; and the learned Judge was of opinion that there was no case for the jury. The plaintiff's counsel then applied for leave to amend the declaration by striking out the word "fraudulently," and by inserting the word "negligently:" but this was refused; his Lordship being of opinion that the declaration, if so amended, would be bad, and that by allowing the amendment the defendants would be deprived of the right of objecting to the declaration by demurrer. A nonsuit was entered, with leave to the plaintiff to move to set the nonsuit aside, and to enter a verdict for him with 105*l.* damages.

Hugh Hill now moved accordingly.—It being admitted that the statement which was made by the defendants, materially affecting the contract which they were employed to complete, was altogether free from any fraudulent intention on their part, the question is, whether the declaration can then be supported. The question may be treated in the two following ways: First, the statement was of a matter entirely within their own knowledge; it was untrue, and was calculated to cause the party to whom it was made to act upon it, and thereby to incur damage. In *Polhill v. Walter* (a), though the jury negatived fraud in fact, yet the action was held to lie, because the representation made by the defendant was false within his knowledge. Lord *Tenterden*, C. J., in the judgment of the Court, says: "It was in the next place contended, that

(a) 3 B. & Ad. 114.

the allegation of *falsehood and fraud* in the first count was supported by the evidence; and that, in order to maintain this species of action, it is not necessary to prove that the false representation was made from a corrupt motive of gain to the defendant, or a wicked motive of injury to the plaintiff; it was said to be enough if a representation is made which the party making it *knows to be untrue*, and which is intended by him, or which, from the mode in which it is made, is calculated, to induce another to act on the faith of it, in such a way as that he may incur damage, and that damage is actually incurred. A wilful falsehood of such a nature was contended to be, in the legal sense of the word, *a fraud*; and for this position was cited the case of *Foster v. Charles* (a), which was twice under the consideration of the Court of Common Pleas, and to which may be added the recent case of *Corbet v. Brown* (b). The principle of these cases appears to us to be well founded, and to apply to the present." [Parke, B.—In that case the defendant was guilty of a legal fraud, for if a party takes upon himself wilfully to tell what he knows to be untrue, he is guilty of a legal fraud; and there the party deceived acted upon the faith of the false statement.] Here the defendants must have known that the contract which they described was not in fact the contract which they had completed for the plaintiff; and that is equivalent to a false description of it within their knowledge: *Collins v. Evans* (c). The one being a contract subject to a condition and the other being without any such condition, the two contracts were altogether different. [Alderson, B.—The defendants' description of the contract cannot be called a false description: the most that can be said of it is, that it is inaccurate.] The defendants could have had no ground for believing that the description of the contract they gave was

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(a) 6 Bing. 396.

(b) 8 Bing. 33.

(c) 5 Q. B. 820.

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the true one. Suppose a person were asked as to the solvency of a third party, and in reply he were to state that he knew he was worth 20,000*l.*, omitting to mention a fact within his knowledge, that the party's property was mortgaged beyond that amount. In that case, the party making the false representation would be liable to an action for the false statement. [*Alderson*, B.—If he made the statement with the intention to defraud. But, in the present case, all imputation of any fraudulent intention was abandoned.]—Secondly, the declaration might be supported by treating the plaintiff's claim as arising upon a breach of duty of the defendants, from their negligent conduct of the transaction as brokers. [*Parke*, B.—The declaration is not framed to meet that view of the case. If the word were introduced into the declaration, it would not be good without an averment that it is the duty of a broker to give an accurate statement of the contract to his principal in all cases. Suppose the contract is completed in the presence of the principal, would it be the broker's duty in that case to give a correct representation of the contract to his employer?] The general duties of brokers are recognised by the superior Courts: *Boorman v. Brown* (a), *Kemble v. Atkins* (b). If the broker takes upon himself to give a description of the contract, it is submitted that he is bound to give a faithful and correct description of it.

PARKE, B.—I am of opinion that there ought to be no rule in this case. The law upon this point is now perfectly well settled, that if the words "falsely and fraudulently" can be struck out of a declaration, so as to leave a good cause of action, that may be done; as, for instance, in a declaration for a breach of warranty of a horse, or as in the late case of *Anderson v. Thornton* (c), in which we

(a) 3 Q. B. 511.

(b) Holt N. P. 437.

(c) Ante, p. 425.

held, that a plea to a declaration on a policy of insurance, averring a fraudulent misrepresentation as to the time of the sailing of the ship, was supported without any proof of fraud, the misrepresentation affording a good defence to the action, although not fraudulent. That principle is applicable to the present case. If we were to strike out those words, we should have to inquire whether it followed as a necessary consequence, that the law merchant casts the duty upon a broker to give to his principal under all circumstances a correct account of his purchase, and this although the principal be present at the time of the purchase. I am not prepared to give any opinion upon that question; and I am therefore doubtful whether the declaration could be maintained without an allegation to that effect; but upon that point I give no opinion. The present case is however distinguishable, for we cannot reject the averment, that the defendants "falsely and fraudulently" deceived the plaintiff, without striking out the whole cause of action. All that follows is merely the explanation of the deceit, and if that be not proved the declaration is not supported; and Mr. *Hill* admits that there was no fraud, in the ordinary sense in which that term is used. *Polhill v. Walter* (a) was an action founded on deceit; and it was there held, that the action lies for a statement which is untrue to the knowledge of the person making it, although he made it without any fraudulent intention. And in that case the statement was false to the defendant's knowledge, and produced a damage to the plaintiff. It is settled law that, independently of duty, no action will lie for a misrepresentation, unless the party making it knows it to be untrue, or makes it with a fraudulent intention to induce another to act on the faith of it, and to alter his position to his damage. This appears from the cases of *Evans v. Collins* (b) and *Ormrod v. Huth* (c), which have perfectly

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(a) 3 B. & Ad. 114. (b) 5 Q. B. 820. (c) 14 M. & W. 651.

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settled the law on that point. Then the only question here is, whether the statement made by the defendant was of such false and fraudulent description. There was not a scintilla of fraud on the part of the brokers. The description they gave, as far as it went, was true; but it omitted a part, and was therefore incomplete. It was merely inaccurate, but cannot be considered as fraudulent on that account. The essence of the declaration is, that the defendants were guilty of a *fraudulent* misrepresentation, and this was not proved.

ALDERSON, B.—After the admission by Mr. *Hill* that there was no fraud, the declaration is gone.

MARTIN, B.—If the plaintiff had intended to charge the defendants with a neglect of duty as brokers, he might have framed his declaration in that view of the case; but, upon this state of the pleadings, he was bound to prove fraud, and this was not done.

Rule refused.

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MORRISON v. THE GENERAL STEAM NAVIGATION COMPANY.

April 23.

CASE.—The declaration stated, that the plaintiff was possessed of a vessel at anchor in the Thames; that the defendants were possessed of a steam vessel, of which they had the management by their servants; and that the defendants took such bad care of their vessel, that, through the carelessness of their servants, it struck the plaintiff's vessel and damaged her.

Plea—not guilty, and issue thereon.

At the trial, before *Pollock*, C. B., at the London Sittings after last Term, it appeared that the action was brought to recover damages for an injury done to the plaintiff's vessel, by reason of the defendants' vessel having run into her. At the time of the collision, the plaintiff's vessel, a collier, was lying at anchor in the river Thames in Gravesend Reach, in the "fairway" of the river, and the defendants' vessel, a steam ship, was proceeding down the river on her voyage to a foreign port. The place where the accident occurred is within the port of London, the right to regulate the navigation of that place being by law vested in the Lord Mayor and Corporation of London, as conservators of the Thames. At the time of the accident, which took place before daybreak on the 14th of Novem-

Under the 14 & 15 Vict. c. 79, by which the Lords of the Admiralty are empowered to make regulations with respect to steam navigation and to the boats and lights to be carried by sea-going vessels, certain regulations were published with regard to "sailing vessels," by which "all sailing vessels at anchor in roadsteads or fairways shall be bound to exhibit, between sunset and sunrise, a constant bright light at the masthead, except within harbours or other places where regulations for other lights for ships are legally established:—"—

Held, that under this regu-

lation every sailing vessel lying at anchor, either in the roadstead or fairway of a stream, is bound to exhibit a bright light at the masthead, unless there be some local provision for a different description of light to be borne by that class of vessels.

The 28th section of the 14 & 15 Vict. c. 79, enacts that, in case of a collision between two or more vessels, if it appears that such collision was occasioned by the non-observance of the foregoing rules with respect to the exhibiting of lights, the owner of the vessel by which any such rules has been infringed shall not be entitled to recover any recompense whatsoever for any damage sustained by such vessel in such collision, unless it appears to the Court before which the case is tried that the circumstances of the case were such as to justify a departure from the rule.

Where a vessel, through sheer negligence, injures another vessel by running her down at night, the mere fact that the injured vessel was at the time guilty of an infringement of the Admiralty rules by not exhibiting a light affords no justification under the preceding section, where the absence of the light does not in any way contribute to the accident.

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ber, the weather was clear and starlight, but the plaintiff's vessel did not exhibit any light.

On the part of the defendants, it was contended that they were not liable, as the plaintiff was bound, under the 14 & 15 Vict. c. 79, and the Admiralty regulations made in pursuance of that Act (a), to have exhibited a

(a) The 14 & 15 Vict. c. 79, is "An Act to consolidate and amend the laws relating to the regulation of steam navigation, and to the boats and lights to be carried by sea-going vessels."

The 26th section enacts, that "The lord high admiral, or the commissioners for executing the office of lord high admiral, shall from time to time make regulations requiring the exhibition of such lights, by such classes of vessels, whether steam or sailing vessels, within such places and under such circumstances as they think fit, and may from time to time revoke, alter, or vary the same, and they shall cause such regulations to be published in the London Gazette, and to be otherwise publicly made known, &c.; and all owners and masters or persons having charge of vessels shall be bound to take notice of the same, and shall, so long as the same continue in force, exhibit such lights, and no others, at such times, within such places, in such manner, and under such circumstances as are enjoined by such regulations; and in case of default, the master or other person having charge of any vessel, or the owner of such vessel, if it appear that he was in fault, shall, for each

and every occasion upon which such regulations are infringed, forfeit and pay a sum not exceeding 20*l*." &c.

The 27th section, after specifying rules to be observed by vessels passing each other, enacts, "That the master of any steam vessel navigating any river or narrow channel shall keep as far as is practicable to that side of the fairway or mid-channel thereof which lies on the starboard side of such vessel, under a penalty of 50*l*."

Section 28 enacts, "That if in any case of collision between two or more vessels it appear that such collision was occasioned by the non-observance either of the foregoing rules with respect to the passing of steamers, or of the rules to be made as aforesaid by the lord high admiral or the commissioners for executing the office of lord high admiral with respect to the exhibition of lights, the owner of the vessel by which any such rule has been infringed shall not be entitled to recover any recompense whatsoever for any damage sustained by such vessel in such collision, unless it appears to the Court before which the case is tried that the circumstances of the case were such as to justify a

bright light at her masthead; and that, by not having done so, he had himself been the main cause of the acci-

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departure from the rule; and in case any damage to person or property be sustained in consequence of the non-observance of any of the said rules, the same shall, in all Courts of justice, be deemed, in the absence of proof to the contrary, to have been occasioned by the wilful default of the master or other person having the charge of such vessel; and such master or other person shall, unless it appears to the Court before which the case is tried that the circumstances of the case were such as to justify a departure from the rule, be subject in all proceedings, whether civil or criminal, to the legal consequences of such default."

The Lords of the Admiralty, in pursuance of the powers vested in them by this Act, made the following regulations, which were duly published in the London Gazette:—

"Admiralty notice, respecting lights to be carried by sea-going vessels to prevent collision:

"By the Commissioners for executing the office of Lord High Admiral of the United Kingdom of Great Britain and Ireland, &c.

"By virtue of the power and authority vested in us by the Act 14 & 15 Vict. c. 79, dated the 7th of August, 1851, we hereby require and direct that the following regulations be strictly observed:—

"Steam Vessels: All British steam-going vessels (whether by paddles or screws), shall, within all seas, gulfs, channels, straits, bays, creeks, roads, roadsteads, harbours, havens, ports, and rivers, and under all circumstances, between sunset and sunrise, exhibit lights of such description and in such manner as is hereinafter mentioned, viz.

"When under steam: A bright white light at the foremost head, a green light on the starboard side, a red light on the port side.

"The masthead light is to be visible at a distance of at least five miles in a dark night with a clear atmosphere; and the lantern is to be so constructed as to shew a uniform and unbroken light over an arc of the horizon of twenty points of the compass, being ten points on each side of the ship, viz. from right ahead to two points abaft the beam on either side.

"2. The green light on the starboard side is to be visible at a distance of at least two miles in a dark night with a clear atmosphere; and the lantern is to be so constructed as to shew a uniform and unbroken light over an arc of the horizon of ten points of the compass, viz. from right ahead to two points abaft the beam on the starboard side.

"3. The red light on the port side is likewise to be fitted so as to throw its light the same distance on that side.

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dent. On the part of the plaintiff, it was urged that the Admiralty regulations were not applicable, as the case came within the exception contained in the notice with reference to "sailing vessels within harbours or other places where regulations for other lights for ships are legally established;" and it was shewn, by certain bye-laws made by the Lord Mayor and Corporation of London, as conservators of the Thames, and which were approved of by the Trinity House, that they had directed all steamboats to carry a light, but that there was not any provision for sailing vessels on that head; and it was therefore contended, that, as the accident had occurred through the gross negligence of the defendants' officers, the defendants were liable in the present action. The Lord Chief Baron was of opinion that the Admiralty regulations with respect to lights did apply to sailing vessels on the Thames within the port of London; and he told the jury that the defendants no doubt were bound, in the navigation of their

"4. The side lights are moreover to be fitted with screens on the inboard side of at least three feet long, to prevent the lights from being seen across the bow.

"When at anchor: a common bright light.

"Sailing Vessels: We hereby require, that all sailing vessels, when under sail or being towed, approaching or being approached by any other vessel, shall be bound to shew, between sunset and sunrise, a bright light, in such a position as can be best seen by such vessel or vessels, and in sufficient time to avoid collision. All sailing vessels at anchor in roadsteads or fairways shall be also bound to exhibit, between sunset and sunrise, a constant bright light at the

masthead, except within harbours or other places where regulations for other lights for ships are legally established. The lantern, to be used when at anchor both by steam vessels and sailing vessels, is to be so constructed as to shew a clear good light all round the horizon.

"We hereby revoke all regulations heretofore made by us relating to steam vessels exhibiting or carrying lights; and we require that the preceding regulations be strictly carried into effect on and after the 1st of August, 1852. Given under our hands the 1st of May, 1852.

"HYDE PARKER,

"P. HORNEY.

"By command of their lordships. W. A. B. HAMILTON."

vessel, to keep a good look out; but that he was of opinion that the plaintiff was bound to exhibit a light under the Admiralty regulations; and that if by not doing so he had himself contributed to the accident, the plaintiff was not entitled to recover. A verdict was found for the defendants.

In the present Term (April 20)

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Watson moved for a rule nisi for a new trial, on the ground of misdirection.—The plaintiff's vessel fell within the exception contained in the Admiralty regulations, as having been at the time of the accident within a place "where regulations for other lights for ships are legally established." And the bye-laws, which regulate ships in this place, although they require steamships to carry a light, do not impose that obligation upon sailing vessels. The bye-law takes the place of the Admiralty regulations. [*Parke, B.*—The Admiralty regulations require all sailing vessels, whether at anchor or sailing, to carry a light; and they are bound to carry the light prescribed, unless there be some local regulations specifying a different kind of light for all "ships," whether steamers or sailing vessels.] It could hardly have been intended that the local regulations should apply to one set of vessels, and that the Admiralty regulations should apply to another.

Secondly.—Notwithstanding the plaintiff may have been guilty of disobeying the Admiralty regulations, still, inasmuch as the defendants were clearly guilty of gross negligence, the Court would be justified in departing from the general rule laid down by the 28th section of the Act, which precludes the injured party, who has been guilty of a breach of the rules, from recovering compensation for his loss.

Cur. adv. vult.

POLLOCK, C. B., now said.—In this case, which was tried before me, and in which there was a verdict for the de-

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endants, *Mr. Watson* moved for a rule nisi for a new trial, on the ground of misdirection.

We have considered the Admiralty regulations, which are distinctly directed to two objects: first, to steam-vessels, and secondly, to sailing vessels; and we are all of opinion, that the meaning of these regulations very clearly is, that every sailing vessel lying at anchor, either in a roadstead or the fairway of a river, shall have a bright light at the masthead, unless there be some provision provided for by local enactment for a different sort of light to be borne by that description of vessel. We are of opinion that the intention of the legislature was, that unless some other sort of light be ordered by local regulations, the vessel must put up the light provided for by the regulations of the Admiralty. The Court concur with me in thinking that the true points were put to the jury, and consequently that my direction upon that subject was quite right. The point I left to the jury involved the question whether the plaintiff himself did not contribute to the accident by his own carelessness. We are clearly of opinion that no change in the law has been effected by this regulation of the Admiralty; but that persons in navigating their vessels are still bound to keep a look out, just as they were before these regulations were made; and if it could be clearly made out that a vessel having no light had been run down by another, from sheer carelessness and negligence in not keeping a good look-out, we agree with *Mr. Watson* in thinking that in such a case the plaintiff would have had a right to compensation from the defendants. But here the case was one for the jury, and we think they have correctly found that the defendants' vessel was in a part of the stream where she had a right to be, and that the accident arose from the plaintiff's own negligence. The point was therefore left to them substantially involving the law as it stood before the statute, and still is, namely, that if the conduct of the party

complaining has either occasioned the loss or has contributed to the occasioning the loss, then he can no more recover now than he could have done before the Act of Parliament was passed and these regulations were made. We therefore are of opinion that, in this case, there ought to be no rule.

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Rule refused (a).

(a) See *General Steam Navigation Company v. Morrison*, 22 L. J., C. P., 178.

NAYLOB and Others v. PALMER and Another.

May 7.

THIS was an action upon a policy of assurance. The declaration stated, that the policy, dated the 14th of November, 1851, was executed by the defendants as two of the directors of the Indemnity Mutual Marine Assurance Company for 5000*l.*, part of 12,500*l.* specie, produce merchandise, on advances, as interest might appear, the advances being intended to cover cost of transport, provisions, and other expenses incurred for the transport of Chinese emigrants, general average, &c., from any port or ports in

To a declaration on a policy of assurance on advances for the transport of Chinese emigrants from China to Peru, for their outfit and provisions, to be paid on the arrival of the emigrants at the port of destination, the perils

insured against being "pirates, rovers, thieves, &c., barratry of the master and mariners, and all other perils, losses, and misfortunes," &c. (in the usual form); the declaration alleging a total loss by the emigrants piratically and feloniously murdering the captain and part of the crew, and feloniously stealing and carrying away the ship;—the defendants pleaded, first, that as soon as the emigrants had committed the murder, and had obtained possession of the vessel, they steered for the nearest land, for the purpose of being landed, and refused to and could not proceed upon the voyage, and the vessel was then fit and able safely to proceed to the said port; and the remainder of her crew could have navigated her there, and were ready and willing to convey the emigrants there if they would have gone, but that they would not; and that, by reason of that refusal and for no other cause whatever, the transport was never completed.

Secondly, as to the taking and carrying away of the vessel, that the emigrants were unwilling to be carried on the said voyage, and that they committed the murder, and took possession of the vessel for the purpose of being landed, and of escaping, and from being carried on the voyage, and for no other purpose, which is the said piratical carrying away of the vessel.

Held, that the pleas were bad.

Semble, that the second plea might have been successfully objected to by application to a Judge at Chambers, on the ground of its being ambiguous whether the plea was intended as an argumentative denial that the murder and carrying away of the vessel was one of the perils insured against, or whether it was intended to deny that the loss was occasioned by that peril.

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Canton waters, Amoy, and Manilla, to any port or ports in Peru, or vice versâ, with leave to call at all ports and places, &c., the assurance to commence upon the said ship at and from and until she had moored at anchor twenty-four hours in good safety, at and upon the freight and goods or merchandise on board thereof, from the loading of the same on board the said ship until they should be discharged and safely landed as aforesaid. The declaration then proceeded to state the perils insured against, to be "of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of marque and counter marque, surprisals, takings at sea, arrests, restraints and detentions of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and all other perils, losses, and misfortunes that had and should come to the hurt, detriment, or damage of the aforesaid subject matter of that assurance or any part thereof." The declaration then averred that, by a memorandum indorsed on the policy as the declaration of interest, it was agreed that the amount of the expense of transport to be covered under that policy should be fixed at the rate of 8*l.* 15*s.* for each Coolie embarked, and it was thereby declared that the said interest should be, amongst others, per "Victory," Mullins, advances on 350 Coolies at 8*l.* 15*s.* each, 3062*l.* 10*s.* The declaration then proceeded to state that, after the making of the said policy, 360 Chinese emigrants or Coolies were, by the agents of the persons interested, in the assurance, shipped on board a ship called the "Victory," lying in a port in the Canton waters called Cumsingmoon, to be carried to Callao in Peru, for money to be paid to the persons interested in the assurance, on the safe landing of each of the said emigrants at the end of the said voyage, and that a large sum of money, amounting to &c., had been advanced by the agents of the persons interested, as the cost of the transport and provisions shipped on board the said vessel, and

other expenses incurred for the transport of the said Chinese emigrants or Coolies; that such advances were necessary for the said transport, and to earn certain money to be earned on the safe arrival of each of such Chinese emigrants in Peru; and that the amount of the said money so to be earned on such delivery of the said Chinese emigrants, and which would have been paid on such delivery, greatly exceeded the amount of such advances; that afterwards, &c., the said ship, called the "Victory," sailed on her voyage towards the said port of Callao with the said Chinese emigrants or Coolies and provisions on board thereof, and that whilst she was proceeding on her voyage, and before her arrival at her destination, and while she was on the high seas, the said Chinese emigrants piratically and feloniously assaulted and murdered the captain of the ship and divers of the crew, and piratically and feloniously by force took, stole, and carried away the said ship and the provisions and cargo of the said ship from the care, custody, and possession of the said captain and crew thereof, and forcibly and against the will of the said crew carried the said ship away, whereby and by reason of which piracy and theft, and the said peril and misfortune aforesaid, the said ship was hindered and prevented from arriving, and never did arrive, at the end of her said voyage, and the said transport of the said Coolies never was completed, and the said advances so insured by the said policy, and all benefit and advantage therefrom, became and were wholly lost to the assured, &c.

To this declaration the defendants pleaded, eighthly, "that, as soon as the said Chinese emigrants had so murdered the said captain and some of the crew and obtained possession of the said vessel, they caused the same to be steered to the nearest land for the purpose of being landed, and refused to and would not and did not proceed on the said voyage or transport, and the said vessel then was fit and able to proceed to the said port, and convey the

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said Chinese emigrants there; and that afterwards, within a few days, they reached the land, and then, and because they would not proceed on the said voyage, they landed and wholly left the vessel, and refused to proceed upon the said voyage and transport; and that the said vessel, when so left by them, was fit and able safely to sail and proceed to the said port of Peru. And that the crew of the said vessel and the mate of the said vessel had then the possession of the same, and could have safely navigated the said vessel to the said port of her destination, and were ready and willing to sail to the said port, and to convey and transport the said Chinese emigrants to the said port if they would have gone there, but that they would not nor would any of them do so; by reason of which said refusal, and for no other cause whatever, the said transport of the said Chinese emigrants was never completed, as in the declaration mentioned."

The defendants pleaded, ninthly, "as to the said taking and carrying away of the said vessel, that the said Chinese emigrants were unwilling to be carried on the said voyage to the said port, and that they murdered the said captain and some of the crew, and took possession of the said vessel for the purpose of being landed and escaping from the said vessel and from being carried on the said voyage, and for no other purpose, which is the said supposed piratical carrying away of the said vessel in the declaration mentioned."

Demurrer to each of these pleas, and joinder.

The case was argued in the present Term (April 27 and May 2) by

Blackburn (*Knowles* with him) in support of the demurrer.—Neither of these pleas affords an answer to the action. The policy is not one of common occurrence, for it is not a policy of insurance either upon emigrants or upon the freight, but it is intended to cover the advances upon

the emigrants and the cost of transport. It resembles that in *Winter v. Haldimand* (a); from which case it appears that such a matter may be legitimately made the subject of speculation, as has been done by the parties to this instrument. Now, the declaration alleges that the loss was occasioned by a peril insured against by the policy; and although the pleas disclose the ground upon which the motive for the piratical and felonious act of the emigrants may have been founded, still they do not shew that the loss was not occasioned by the peril. Taking the ninth plea first: that plea seems intended to embody two defences; for it either is intended to deny that the murder of the captain and the crew and the running away with the ship was piratical and felonious, that act having been done by the emigrants with the sole object of preventing their arrival at the destined port; or the plea may be intended to shew that their unwillingness to proceed was the immediate cause of the loss, and that the piratical act was merely one of the means taken for effecting their object. But the facts contained in this plea do not deprive the act, which occasioned the loss, of its character, and do not make it the less a peril or of the nature of the class of perils insured against. For if that act was neither piratical nor barratrous, still it was a peril ejusdem generis with those included in the policy. For this position the following cases are express authorities: *Cullen v. Butler* (b), *Butler v. Wildman* (c), *Phillips v. Barber* (d). It would, however, seem that the act was piratical, from the definition given by text writers upon the subject. Hawk. Pl. C. 20; *Emérigon's Traité des Assurances*, Vol. 1, p. 516, Paris, 1827; 3 Kent's Comm. p. 302. [*Platt*, B., referred to 11 & 12 Will. 3, c. 7.] But assuming the murder of the captain and the crew, and the running away with the vessel, to be

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(a) 2 B. & Ad. 649.

(b) 5 M. & S. 461.

(c) 3 B. & Ald. 398.

(d) 5 B. & Ald. 161.

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one of the perils insured against, that act was the direct and immediate cause of the loss. As to the eighth plea, it is clear that, although an interval occurred between the piratical act and the loss, in which interval the Coolies might have changed their intention, still as they did not do so, and inasmuch as they could not have carried that intention into effect without the execution of the piracy, that was the legal cause of the loss.

Bramwell (J. *Wilde* with him) contra.—The pleas, when considered, shew that the loss was not occasioned by any peril contemplated by the policy. The plaintiffs, in order to succeed in this action, must convince the Court of two things: first, that a peril occurred contemplated by the policy, and secondly, that such peril was the cause of the loss. First, assuming the murder of the captain and of part of the crew, and the taking away of the vessel by the emigrants, to have been a piratical act, and therefore a peril insured against, that act was not *the* cause of the loss. The loss was not the necessary consequence of that act. By the terms of this policy the insurer seeks to insure the arrival of the emigrants at the port of their destination. The subject-matter of the insurance is the arrival of the emigrants, and not the safety of the ship. They did not arrive, and the question is, to what cause is their non-arrival to be attributed? Both of the pleas shew that this was solely owing to the emigrants having changed their intention of pursuing the voyage. This change of purpose was the sole cause of their not arriving. The act of piracy (assuming it to have been such) may have been also caused by this change of purpose: but the act of piracy did not occasion the loss. If the policy of insurance had contained a clause by which the underwriter had agreed to be liable in case of loss by reason of the emigrants changing their minds, the liability of the defendants could not have been disputed. Supposing then that this had been an insurance

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against "the unwillingness of the emigrants to go on the voyage," and warranted free from piracy, the plaintiffs would then have contended, that the immediate cause of the loss was the unwillingness to go, and not the piracy. It is stated in the eighth plea, that after the act the vessel was fit and able to proceed, and that the remainder of the crew might have safely navigated her to the end of the voyage, but that the emigrants, although they might have gone, *would* not, and that such unwillingness to proceed was the cause of their not going. [*Parke, B.*—What would have been the position of the emigrants if they had not committed the piratical act?] It may be admitted that except for the commission of that crime, they could not have escaped, but it was not the *causa causans*. It was at the most but a retardation of the voyage. It gave them the opportunity of causing the loss. If the vessel had been driven ashore by a storm, and the emigrants had jumped ashore to save themselves, and the vessel had afterwards got safely off, and had been well able to prosecute the voyage, and the emigrants had been invited to return on board for that purpose, but had refused to do so, could it have been said that their not arriving was caused by a peril of the sea? If the vessel had been captured by pirates, and taken by them into some foreign port and had been abandoned by them, and after the lapse of some considerable time the captain had proposed to prosecute the voyage, but the emigrants who had been put on shore had refused to go, that would not have been a loss by piracy. The case of *Livie v. Janson* (a) is in principle expressly in point; there, a ship "warranted free from American condemnation" was driven upon the rocks, and much, though only partially, damaged in trying to escape by night out of the port of New York from an American embargo, but the next day, having been deserted by her crew, was got off by the

(a) 12 East, 648.

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Americans and condemned by them for breach of the embargo: the underwriters were held to be protected from a claim for total loss by the warranty. The following are authorities that the *causa proxima* and not the *causa remota* is to be looked at, in considering the question as to the origin of the loss: *Naylor v. Taylor* (a), *Jones v. Schmoll* (b), *Sarguy v. Hobson* (c), and *Powell v. Gudgeon* (d). It is therefore clear that the loss was not the necessary consequence and inevitable result of the act.

Secondly, the murder of the captain and of part of the crew, and the running away with the vessel, was not a piratical act, nor was it a peril *ejusdem generis* with those in the policy. The subject of the policy was the arrival of the emigrants themselves, and the perils contemplated do not include such dangers and misfortunes as they would of their own free will occasion to themselves. It was intended to provide for injuries occasioned by third parties. And, moreover, the act was not done *animo furandi*, but for the sole object of effecting their escape.

Blackburn in reply.—As to the last point, it is clear that the act falls within the expression of a peril *ejusdem generis*. It was perpetrated by persons who are not the master and the mariners, nor strangers, but who occupied an intermediate position. It was perhaps neither strictly a piracy nor an act of barratry, but still it partakes of the nature of both; and whether it was done *animo furandi* or not is immaterial. The declaration alleges it to have been felonious, and the object the emigrants had in view does not lessen the offence or alter its character. Assuming, therefore, that the peril was one provided for by the policy, that peril caused the loss. The maxim, *causa proxima non remota lege spectatur*, is applicable to this

(a) 9 B. & C. 718.

(b) 1 T. R. 130, n.

(c) 4 Bing. 131.

(d) 5 M. & Selw. 431.

case; and what Lord Bacon says, makes the application of it clear:—"It were infinite for the law to judge the causes of causes, and their impulsions one on another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree (a)." The unwillingness of the emigrants may have been the impulsion on their minds which prevented them from continuing the voyage, but that also led them to commit the murder and to steal the ship; and if the unwillingness to go be taken as the proxima causa, the next inquiry might be as to the cause which brought about that unwillingness to proceed. Their non-arrival, therefore, is immediately traceable to the piratical act, by the means of which they were enabled to carry their intention into effect. The commencement of the total loss dates from that moment when the vessel was taken out of the control of her commander and crew, and that loss was never redeemed; for, although the emigrants might then have had it in their power to continue the voyage, they did not do so. In *Hahn v. Corbett* (b), the ship was stranded and disabled from proceeding, but, whilst she lay in the sand, she was seized and captured, and, in an action on the insurance of goods in the ship warranted free from capture, it was held that the loss of the goods arose from the perils of the seas, and not the seizure. And in *Dixon v. Reid* (c), a ship, with her cargo, was barratrously taken out of her course by the crew, the ship and part of the cargo were sold, and the remainder was sent home by another vessel; and it was held that there was a total loss of the cargo from the time of the act of barratry.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—This is the case of an action on a policy

(a) Bac. Max. 1.

(b) 2 Bing. 205.

(c) 5 B. & Ald. 597.

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of assurance against a Mutual Marine Assurance Company, on advances for the transport of Coolies, Chinese emigrants, from China to Peru, for their outfit, provisions, &c., to be repaid upon the delivery of the emigrants at the port of destination in Peru, on board a particular vessel declared in the policy. The assurance is against pirates, thieves, and all other the usual perils, and a total loss is alleged to have taken place by the act of the said Chinese emigrants piratically and feloniously murdering the master and part of the crew, and piratically and by force stealing, taking, and carrying away the ship, provisions, and cargo from the possession and custody of the master and crew, by reason of which piracy and theft the vessel was hindered and prevented from arriving, and the transport of the Coolies never was completed, and the advances upon them insured by the policy were lost.

To this declaration there were two pleas, the eighth and ninth, which were demurred to, and the demurrer was fully argued before us a short time ago. These pleas were as follows: [His Lordship stated them and proceeded:] The meaning of the ninth plea is, perhaps, ambiguous; and that ambiguity arises from the new form of pleading adopted in consequence of the new Common Law Procedure Act, and probably it might have been objected to by an application to a Judge. The doubt is, whether it means to confess and avoid the allegation of piratically and feloniously stealing and carrying away the vessel, by reason of its arising from the unwillingness of the Coolies to proceed on the voyage, and so not within the perils insured against, or whether it is an argumentative traverse of that piratical and felonious act, viz. that it was not an act of that description, because the vessel was carried away not with intent to deprive the owners of the property but solely to prevent the Coolies from being carried on the said voyage.

All doubt would have been removed had the old form

of pleading continued, for if the last had been the intention of the pleader, the plea would have concluded with a traverse of the piracy and felony.

Taking it to mean either a confession and avoidance or a denial of the piracy, we are of opinion that it is no answer to the action.

Considering the defence made by the ninth plea first, and then that by the eighth, the questions raised by the pleadings are

First, whether the assured are entitled to recover for a loss occasioned by the act of the Coolies, in piratically and feloniously running away with the vessel (for the murder of the captain and crew is, with reference to this present question, immaterial); which piratical act caused the Coolies not to arrive at their port of destination, and so prevented the sum insured from being earned,—if the cause of that act was the unwillingness of the Coolies to be carried to the end of the voyage.

Second, whether, as the Coolies did not arrive at their port of destination, the assured were entitled to recover, if the act which prevented their arrival was not piratical and felonious, but was the taking of the vessel from the possession of the master and crew, and running away with it by the Coolies, for the mere purpose of being landed and escaping from the said vessel.

Thirdly, was the act of piracy or running away, as the case may be, not the cause of the total loss of the sum insured, because the vessel was afterwards in safety, fit and able and ready to proceed on the voyage, and convey the Coolies if they would have gone, but they would not proceed on the voyage, and by reason of that refusal the transport was not completed.

We are of opinion that none of these three circumstances affect the plaintiff's right to recover; and consequently that both the pleas are bad.

The proximate, and not the remote, cause of the loss is

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always considered, according to the well-known legal maxim expounded by Lord Bacon, *causa proxima non remota in lege spectatur*. The act of seizure of the ship, and taking it out of the possession of the master and crew by the passengers, was either an act of piracy and theft, and so within the express words of the policy, or, if not of that quality, because it was not done *animo furandi*, it was a seizure *eiusdem generis* analogous to it, or to barratry of the crew, falling within the general concluding words of the perils enumerated by the policy. It was a peril insured against, whatever the cause of the seizure was, and though the cause of the seizure was no such peril, for the above-mentioned maxim applies.

The only remaining question is, whether that seizure caused the total loss (not of the ship, for that is not the subject of this insurance, but) of the *sum insured*, which depended on the safe arrival of the Coolies. It is averred that it did, and must be so taken, unless the circumstance that the loss would not have occurred if the Coolies would have returned to the ship, as averred in the eighth plea, makes any difference. We are clearly of opinion that it does not.

They *did not* return to the ship, and the total loss of the sum insured, *primâ facie* caused by the seizure of the ship and the escape of the Coolies, never ceased to be what we say it was, a total loss so caused; because, presumably, it would not have occurred if the ship had not been run away with; for the Coolies, however unwilling to proceed, would then have remained in safety in their prison, the ship, and been delivered at their port of destination.

The running away with the ship was as much the cause of the loss as if the ship had been seized and taken out of the possession of the crew by strangers, and then abandoned, and the cargo had consisted of wild animals, who had escaped or been let loose by them whilst they were

in possession, and could not be caught again after the captors abandoned the possession; or as if slaves (when lawfully the subject of insurance), who had been conveyed in a vessel that was driven on shore by perils of the seas, and by reason thereof escaped; the perils of the sea would be the cause of a total loss of the subject insured. In both these cases, as in the present, a peril insured against by the policy happened, and in both the consequence of that peril was the loss of the subject insured. Therefore our judgment will be for the plaintiff.

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Judgment for the plaintiff.

HILLS v. MITSON.

ASSUMPSIT on a promissory note dated the 30th of September, 1851, made by the defendant for payment of 50*l.*, three months after date, to Messrs. Hills, and indorsed by them to the plaintiff.

Plea, (inter alia), that before the making of the note, and after the passing of the 1 & 2 Vict. c. 110, to wit, on &c., one C. W. Heiden was indebted to Messrs. Hills and others, and being so indebted, and being then in actual custody within the walls of Horsemonger-lane Gaol, upon certain process for debt, damages, and costs, amounting together, to wit, to 50*l.*, at the suit of one H. Ollard, the said C. W. Hei-

Jan 26,
April 22.
To an action on a promissory note the defendant pleaded, that, after the passing of the 1 & 2 Vict. c. 110, one H. being indebted to Messrs. H. and others, and being in actual custody within the walls of Horsemonger-lane Gaol on a judgment at the suit of O., did, within 14 days after such im-

prisonment, petition the Insolvent Court for his discharge under that Act; and that, while the petition was pending, and in order to induce Messrs. H. to cease from opposing, and not thereafter to oppose his discharge as they had threatened, the defendant and O. made the note in question, and delivered it to Messrs. H., who indorsed it to the plaintiff with notice:—*Held*, on motion for judgment non obstante veredicto, that the agreement set forth in the plea was illegal and void, and the plea good.

Held, also, that the copy of the causes of the insolvent's detention filed with the petition, and sealed with the seal of the Insolvent Court, was not made evidence by the 105th section of the 1 & 2 Vict. c. 110, of the fact alleged in it, that the insolvent was in actual custody within the walls of a prison at the time of his petition.

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den did within fourteen days next after the commencement of his actual custody, to wit, on &c., according to the provisions of the said Act, apply by a petition in a summary way to the Court for the Relief of Insolvent Debtors in England for his discharge from such custody, according to the provisions of the said Act, prout patet, &c., whereof the said Messrs. Hills had notice: and thereupon afterwards, and before the discharge of the said C. W. Heiden, pursuant to the said petition, and while the same was pending in the said Court, to wit, on &c., the defendant and the said H. Ollard, in order to induce the said Messrs. Hills to cease from opposing and not thereafter to oppose the discharge of the said C. W. Heiden by the said Court pursuant to the said petition, as they had threatened to do, and in consideration that they the said Messrs. Hills would not thereafter oppose such discharge as aforesaid, and for no other consideration whatsoever, so made and delivered the note in the declaration mentioned to the said Messrs. Hills for the purpose and upon the terms and for the consideration aforesaid, and not otherwise; and except as aforesaid, there never was any consideration or value for the making or payment of the said note. The plea then averred, that the plaintiff took the note with notice of the premises.—Verification.

Replication de injuriâ.

At the trial, before *Jervis*, C. J., at the Kent Summer Assizes, 1852, the defendant, in support of this plea, put in evidence an office copy of the petition and schedule, which stated, in the usual way, the custody and the time of the commitment; and to it was annexed the usual copy of causes of the insolvent's detention, which was signed by the proper officer of the Insolvent Court, with the seal of that Court affixed to it. It was stated by a witness, that the arrest of the insolvent was a friendly arrest; and it further appeared that a solicitor had been instructed to oppose the insolvent's discharge.

It was objected, on the part of the plaintiff (*inter alia*), that there was no evidence that the insolvent was in actual custody at the time of the petition, as alleged in the plea, as the copy of causes was not evidence of that fact. The learned Judge, however, overruled the objection, and held that there was evidence to go to the jury; and he was of opinion that it was to be presumed that the commissioner had acted with jurisdiction, unless the contrary was proved. A verdict was found for the defendant upon this plea.

In the following Term, *M. Chambers* obtained a rule nisi for a new trial, on the ground of misdirection, and also for judgment non obstante veredicto on the plea.

Bramwell, in last Hilary Term, shewed cause against the rule to enter the judgment for the plaintiff non obstante veredicto (January 15 & 18).—The plea is good, both on principle and authority. It shews that the consideration for the promissory note was forbearance to oppose the insolvent's discharge; and such a bargain is contrary to the policy of the insolvent law, and therefore illegal. The legislature, in passing the 1 & 2 Vict. c. 110, had three objects in view: first, the relief of insolvent debtors, except so far as the Court might otherwise direct: (sections 23, 90, 91). Secondly, the distribution of their estate among their creditors: (sections 87, 88); and thirdly, the punishment of insolvent debtors for fraud or misconduct. The 69th section requires every prisoner, after the vesting order is made, to file a schedule of his debts and property. As soon as the schedule is filed, the Court must appoint a time and place for the prisoner to be brought up before the Court: (section 70). The 71st section requires notice to be given to all the creditors. The 72nd section enables any creditor to oppose the prisoner's discharge. The 75th section gives the Court a general power to adjudge a prisoner discharged from custody and entitled to the benefit of that Act; and the three following sections

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point out the mode in which that power is to be exercised. By section 76, the Court may, at its discretion, adjudge a prisoner to be discharged forthwith, or so soon as he shall have been in custody at the suit of one or more creditors for a period not exceeding six months. By section 77, for certain defined offences against the whole body of creditors, the Court may adjudge the prisoner to be discharged, so soon as he shall have been in custody at the suit of one or more creditors for a period not exceeding three years. These two last enactments are for the benefit of the entire body of creditors. Then, by section 78, if the prisoner has been guilty of fraud or misconduct towards any creditor, the discharge is to be at a period not exceeding two years. This latter provision was manifestly intended for the benefit of the particular creditor who may have been injured. It is obvious, from these enactments, that it is not the opposing creditor alone who is interested in the opposition, but that it enures to the benefit of the other creditors. If, however, the agreement stated in this plea be valid, the object of those provisions will be utterly frustrated; for a prisoner, fearing opposition from a particular creditor, might arrange with him by means of a third person, at the same time undertaking to repay the latter after his discharge. Such an undertaking would be clearly in violation of the policy of the Act. [*Parke, B.*—The detaining creditor may at any time consent to the prisoner's discharge, whether he has received payment or not; then why may he not discharge the prisoner on receiving the security of a third person?] Every creditor is to have notice and the power of opposing; and it is manifest that the means of discovery as to the estate and effects of the prisoner is to be exercised for the benefit of all the creditors. Before adjudication, there can be no lawful bargain between the detaining creditor and the insolvent; for, until adjudication is pronounced, it cannot be known whether it may not proceed upon some ground in which the body of creditors are

interested. It is only after a remand at the suit of a particular creditor, that an arrangement may be made for the prisoner's discharge. That appears from the 85th section, which provides, that where it has been adjudged that a prisoner shall be discharged at a future period, he shall be liable to be arrested at the suit of any one or more of his creditors, with respect to whom it shall have been so adjudged. In that case, the creditor has the option of keeping the prisoner in custody, or of releasing him on receiving payment of his debt. In *Murray v. Reeves* (a), the attorney of an insolvent, in consideration of a creditor withdrawing his opposition, undertook that he should be sole assignee of the insolvent's estate, and should receive 100*l.* out of it, within three weeks from his appointment; and that agreement was held void, as being contrary to the policy of the Insolvent Act, 1 Geo. 4, c. 119. The principles of that decision were recognised and adopted in *Hall v. Dyson* (b), where it was held that, although there is no legal obligation on a creditor of an insolvent to oppose his discharge, yet, where he has given notice of an opposition, and led other creditors to believe that he will proceed, and that the case will be properly adjudicated on, the subsequent withdrawal of his opposition is not a valid consideration to support an agreement to pay money to him. *Coleridge, J.*, there says, "It may be true that in all these cases there is only a duty of imperfect obligation imposed on the creditor, the performance of which he may omit without being guilty of any wrong. But, here he seeks to make his breach of duty the ground of a contract, and to have the promise to pay this money enforced by law. Clearly, a Court of law would never lend itself to enforce performance of such a contract." Moreover, the decisions under former Insolvent Acts shew, that agreements of this description are in contravention of the policy of the insol-

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(a) 8 B. & C. 421.

(b) 21 L. J., Q. B., 224.

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vent law: *Gould v. Williams* (a), *Rogers v. Kingston* (b), *Jackson v. Davison* (c), *Tabram v. Freeman* (d). The same principle was affirmed in *Nerot v. Wallace* (e), which arose under the bankrupt law.

Montagu Chambers and *Willes* in support of the rule.—In the cases referred to, the agreement was either with the insolvent himself, and so had the effect of giving to a particular creditor property which ought to have been distributed amongst the general body of creditors, or it was an agreement in fraud of the creditors. But there is nothing in the spirit or details of the Insolvent Act which precludes a stranger from agreeing with a creditor to withdraw his opposition in consideration of money to be paid by the stranger. The statute enables the Court to discharge insolvent debtors, not from their debts—for their after-acquired property vests in their assignees for the benefit of the creditors—but from imprisonment in respect of those debts. An agreement of this description, so far from being opposed to the policy of the Act, is in furtherance of it. Suppose, for instance, there are ten creditors, but the estate is only sufficient to pay five, if a stranger induces five to withdraw their opposition by paying them, it is obvious that the other five will receive immediate payment in full; whereas they must otherwise have taken their chance of obtaining it from any after-acquired property of the insolvent. Again, suppose that a creditor was about to oppose on some ground which would enable the Court to remand the insolvent to prison for two or three years: if a stranger paid the creditor's debt and so released the insolvent, the other creditors would derive an advantage from his being free, inasmuch as he would then have an opportunity of exerting himself to acquire pro-

(a) 4 Dowl. P. C. 91.

(b) 2 Bing. 441.

(c) 4 B. & Ald. 691.

(d) 2 Dowl. P. C. 375.

(e) 3 T. R. 17.

perty to satisfy their claims. The clauses of the Act are not at variance with such an agreement. The insolvent is required to give notice to all his creditors, and each one is entitled to oppose his discharge. But if a creditor who has received notice neglects to protect his own rights, there is no reason why an opposing creditor should be considered as his representative. If in this case the creditor had actually opposed, and the Court had adjudged that the insolvent be discharged at some future period, it would have been perfectly legal for the insolvent or a stranger to have paid the debt, and so obtain the insolvent's release. Then, why may not that be done before as well as after adjudication? In *Hall v. Dyson*, the plea expressly averred that the opposition was withdrawn in fraud of the other creditors, and without the privity or consent of the Judge of the Court. This plea contains no such averments, and the Court will not presume illegality where it is not alleged on the record: *Jones v. Waite* (a), *Simpson v. Lord Howden* (b). Indeed, it is consistent with every allegation in the plea, that the Court was aware of the agreement, and that the other creditors assented to it. A covenant by a friend of a bankrupt to pay all his creditors their full debts, in consideration that they will not proceed any further under the commission, is good in law: *Kaye v. Bolton* (c). Here, the plea only states that the creditor *threatened* to oppose. The mere ceasing to oppose is not of itself illegal, neither is the act of obtaining payment from a third party; then how can two acts, innocent in themselves, become an unlawful act by being joined? *Hall v. Dyson* proceeded on the ground, that there was a moral obligation on the opposing creditor to continue his opposition, because he had led the other creditors to believe that he would go on, and that the case would be properly adjudicated upon by the Court. But

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(a) 5 Bing. N. C. 341. (b) 9 C. & F. 61. (c) 6 T. R. 134.

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that implies that the agreement not to oppose was concealed from the other creditors. Here, there is no allegation to that effect.

Cur. adv. vult.

POLLOCK, C. B., said—We are all (a) of opinion that the objection to the plea cannot be sustained. The case of *Hall v. Dyson* (b) seems to us conclusive. The plea, in the present case, contains more than the plea in that case, and we cannot say that it is bad. Whether it was proved is another question, which will be argued upon a future day.

Bramwell afterwards shewed cause against the rule for a new trial (April 22).—There was evidence for the jury in support of the allegation in the plea, that Heiden was in actual custody at the time of the petition. But if the Court should be of opinion that there was no such evidence, still the plea was sustained, as the allegation in question is immaterial, and need not be proved. First, it was proved that one of the creditors had arrested the insolvent, and it was said that the arrest was friendly; and further, that a solicitor had been instructed to oppose his discharge. The necessary inference from these facts is, that the insolvent was in custody at the time he petitioned. Moreover, the copy of the causes of the insolvent's detention, put in with the petition and schedule, was evidence of that fact. By the 27th section of the 1 & 2 Vict. c. 110, the Insolvent Court is made a court of record, and the seal of the court is to be affixed to all such records, proceedings, documents, and copies, as are required to be sealed by the Act, and all such other documents, &c., as the Court shall direct. The 35th section, upon which the present plea is founded, en-

(a) *Pollock, C. B., Parke, B., Alderson, B., and Martin, B.*

(b) 21 L. J., Q. B., 224.

ables persons imprisoned for debt to apply to the Court for their discharge. It provides for the mode of application by petition, and enacts that, "in such petition shall be stated the time and place of the first arrest of such prisoner in the cause or causes wherein he shall then be detained, and the time of his commitment to the prison where he shall then be confined." Then the 105th (a) section enacts, that "a copy of such petition, vesting order, schedule, order of adjudication, and other orders and proceedings purporting to be signed by the officer in whose custody the same shall be, or his deputy, certifying the same to be a true copy of such petition, &c., or other proceeding, and purporting to be sealed with the seal of the said court, shall at all times be admitted in all Courts and places whatever as sufficient evidence of

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(a) Sect. 105 enacts, "that the proper officer of the said Court for the Relief of Insolvent Debtors shall, on the reasonable request of any such prisoner as aforesaid, or of any creditor or creditors of such prisoner, or his, her, or their attorney, produce and shew to such prisoner, creditor, or creditors, and his, her, or their attorney, at such times as the said court shall direct, such petition, vesting order, schedule, order of adjudication, and all other orders and proceedings made and had in the matter of such petition, and all books, papers, and writings, filed in such matter, and permit him, her, or them to inspect and examine the same, and shall provide for any such prisoner, creditor, or creditors, or his or their attorney requiring the same, a copy or copies of any such petition, vest-

ing order, schedule, order of adjudication, or other order or proceeding, or of such part thereof as shall be so required, receiving such fee as the said court shall appoint for so providing the same; and that a copy of such petition, vesting order, schedule, order of adjudication, and other orders and proceedings purporting to be signed by the officer in whose custody the same shall be, or his deputy, certifying the same to be a true copy of such petition, vesting order, schedule, order of adjudication, or other proceeding, and purporting to be sealed with the seal of the said court, shall at all times be admitted in all Courts and places whatever as sufficient evidence of the same, without any other proof whatever given of the same."

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the same, without any other proof whatever given of the same." [Parke, B.—What is there to make that document evidence of the facts it contains?] It is a proceeding in the Insolvent Court, which is a court of record, and sealed with its seal, and this Court is bound to give credence to such authenticated proceedings.

Secondly.—The allegation that the insolvent was in custody at the time is an immaterial allegation, and need not be proved. The insolvent was before the Court upon the subject of the petition, and the agreement to withdraw the opposition under such circumstances was equally unlawful, whether the Insolvent Court had jurisdiction or not. [Parke, B.—If the Court had no jurisdiction, the discharge would be of no validity.] Still, the taking of the note upon such terms would be a fraud upon the whole body of creditors and upon the public. The consideration was illegal.

Willes (*Chambers* with him) in support of the rule, was stopped by the Court.

POLLOCK, C. B.—We must administer the law as we find it, however unsatisfactory the application of it to a particular case may be. If there was no proof of the fact, as alleged in the plea, that the insolvent was in actual custody at the time of the petition, we must give the plaintiff the benefit of his objection, by making the rule absolute for a new trial. The only question then is, whether the direction of the learned Judge at the trial, with respect to the proof of this part of the plea, was correct; and we are all of opinion that it was not. The particular document tendered to prove that the insolvent was in custody within the walls of a prison, and which is called a copy of causes, is not evidence of the party being in prison. It is not made evidence by the 105th section, for it is not one of the proceedings of the Court. The Lord Chief

Justice was wrong in assuming that the Court had jurisdiction till the contrary was shewn. The rule will, therefore, be absolute.

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PARKER, B.—I am of the same opinion. It has been urged that, in the proof of this plea, it is unnecessary to shew that the insolvent was in actual custody at the time of the petition, thereby to give the Insolvent Court jurisdiction in the matter; and therefore that such allegation, by reason of its being immaterial, may be struck out of the plea. But I entertain very great doubts upon that point; and if the Lord Chief Justice had so held, the plaintiff might have tendered a bill of exceptions, as it is not perfectly clear that the allegation in question could be struck out. But, at all events, the Court could not refuse to grant a new trial upon that ground. It was said by the learned Judge that he must assume *prima facie* that the Insolvent Court had jurisdiction. That is not correct, for the defendant is bound to establish the fact; and the question is, whether there was evidence to go to the jury in support of the plea: the objection not being made to the direction of the learned Judge, for he did not reject any of the evidence, but to his holding that there was evidence to go to the jury to support the plea. If then there was such evidence, there ought not to be a new trial. But I think that, in this case, there was no sufficient evidence that the insolvent was in actual custody at the time of the petition. It was contended that the statement, that it was a friendly arrest, was some evidence; but that is not of itself enough; for it was not only necessary to prove that the insolvent had been arrested, but that he was also in custody at the time. The parole evidence, therefore, was not sufficient. It was then said, that the document which had been obtained from the proper officer of the Insolvent Court, and with the seal of the Court, viz. the copy of the causes of detention,

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was evidence of the fact of imprisonment. Now, assuming that document to have been put in evidence (which the plaintiff's counsel disputes), the question is, whether it was evidence under the 105th section of the Act, by which copies of all orders and proceedings made and had in the matter of the petition, sealed with the seal of the Court, are admissible as sufficient evidence of the same. It appears to me to be clear that that section applies only to the proceedings of the Insolvent Court; and that this document is not such a proceeding. It was not made evidence by having the seal of the Court affixed to it; and as there was no evidence either with it or independently of it to go to the jury, the rule must be absolute.

PLATT, B.—It seems to me that, in order to establish this plea, it is necessary to shew that the insolvent was in custody within a prison. It was necessary to shew that the Insolvent Court had jurisdiction; and it was essential to that jurisdiction that the incarceration of the insolvent existed at the time of the petition. And I am of opinion that there was no sufficient evidence of that fact. The copy of the causes was no evidence against the plaintiff; it was not made so by the 105th section. It is not a step in the cause, nor a proceeding of the Insolvent Court, to which proceedings that section alone applies. Independently of this document, there was no evidence that the insolvent was in prison; the conclusion of his being in prison cannot be drawn as a necessary consequence from its being a friendly arrest. The proof would have been easy, for the defendant might have called some person from the prison to shew that, upon the particular day, the insolvent was there in confinement.

MARTIN, B.—It is not possible to say that, according to the present legal system, there ought not to be a new trial. But I much regret the present state of the law, as I have

not the slightest doubt in my own mind that the insolvent was in actual custody at the time.

Rule absolute.

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April 22 &
26.

THIS was an action for taking the plaintiff's goods.—Plea, not guilty by statute (a).

At the trial, before *Martin*, B., at the Middlesex Sitings in last Term, it appeared that the action was brought to recover the value of certain goods of the plaintiff, which had been seized under a warrant of distress for rent due and owing to the plaintiff by one Quested, for certain copyhold premises. It appeared that, in the year 1813, one J. W. Harper was admitted tenant of the premises as

In 1824, J. W. H., the tenant of certain copyhold premises, demised them for twenty-one years from Christmas, 1823; and the lease contained a covenant for further renewal. In January, 1847, the devisees of J. W. H., who had been admitted

tenants as such by the lord of the manor, demised the premises to one M., who had previously purchased the lessee's interest under the lease of 1824. In May, 1847, M. demised the premises to one Quested, and, in July, 1847, Quested mortgaged the premises to the defendant. By this deed Quested, in consideration of the sum of 400*l.* advanced by the defendant, granted, bargained, sold, and demised the premises to him for the residue of the term wanting one day, and also the benefit of the covenant for further renewal. The deed contained a proviso for redemption in case Quested should pay 10*l.*, being one half year's interest, on the 29th of January, 1848, and 410*l.*, the principal sum and interest, on the 29th of July, 1848. The deed contained covenants for the payment of principal and interest; and it also provided, that Quested should remain in possession until default in payment, with a power to sell the premises; and the proceeds of such sale were to go first in satisfaction of the principal and interest, and the surplus, if any, to Quested. And it was further agreed that Quested should hold the premises as tenant at will to the defendant, at the clear yearly rent of 150*l.*, payable quarterly, for which rent it should be lawful for the defendant to distrain; but that the defendant might at any time determine the tenancy, by leaving a written notice on the premises, and that the defendant should apply the rent, when received, in satisfaction of the principal and interest, and should pay the surplus, if any, to Quested. During the continuance of this lease, Quested assigned his interest in the premises to one Sandell, who took possession, and placed a board over the door with "Sandell late Quested" upon it. The plaintiff's goods, which were on the premises, were seized as a distress for three quarters of a year's rent due from Quested to the defendant:—*Held*, in an action for the seizure of the goods, first, that the proof of the devisees of J. W. H., admitted tenants as such by the lord of the manor, being in possession at the time they granted the lease, and of M., the lessee, holding under them, was *prima facie* evidence of their title.

Secondly, that the clause in the deed of mortgage, professing to create a tenancy, was operative, as not being inconsistent with the main object of the instrument, and that a tenancy at will was thereby created.

And thirdly, that the subdemise by the tenant at will, without notice thereof to his landlord, was not a determination of the will.

(a) The defendant had pleaded another plea, which was held bad on demurrer, ante, p. 138.

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devisee under his father's will; and by a lease, dated the 2nd of December, 1824, he demised the premises from Christmas, 1823, for twenty-one years, with a covenant for further renewal. In 1837, Harpur devised all his freehold and copyhold estates to his two sisters and his nephew, and they were in that year admitted tenants of the premises in question, as such devisees, by the lord of the manor. In January, 1847, the devisees demised the premises to one Muggeridge, who had previously purchased the lessee's interest, under the lease of 1824, for twenty-one years from Christmas, 1844. In May, 1847, Muggeridge leased the premises to one S. Quested; and, in July, 1847, a deed was executed between Quested of the one part, and the defendant of the other, by which, after reciting the indenture of lease of May, 1847, made between Muggeridge and Quested, of the said premises belonging to J. W. Harpur, for the said term of twenty-one years, with a covenant for further renewal, and that the last-mentioned indenture of lease and term thereby demised were vested in Muggeridge, with the benefit of such covenant for further renewal; and that the said recited indenture contained a covenant on the part of Muggeridge to obtain a renewal of such lease from the said J. W. Harpur, and, upon the same being obtained, to grant to Quested another lease for twenty-one years, with a covenant on the part of Quested to accept the same; and also reciting, that Quested, having occasion to borrow the sum of 400*l.*, the defendant had agreed to lend it him, it was thereby witnessed, that, in consideration of the sum of 400*l.* so advanced by the defendant, Quested did thereby grant, bargain, sell, and demise to the defendant all the premises comprised in and demised to Quested by the said recited indenture of lease of the 24th of May, 1847, to hold, from the date of those presents, for the residue of the term of twenty-one years wanting one day; "of which reversion in the said demised premises, as also of the benefit of such covenants for re-

newal or grant of further terms as are contained in the hereinbefore recited indenture of lease, or of such part or parts thereof as he the said J. Souster (the defendant), his heirs, executors, &c., shall think proper or require, he the said S. Quested doth hereby, for himself, his executors, &c., agree to and with the said J. Souster, his executors, &c., to stand possessed in trust for the said J. Souster, his executors, &c., to be assigned or otherwise disposed of or dealt with as he or they shall direct, freed and absolutely discharged from or effectually protected or indemnified against all and every the rents in and by the same indenture of lease reserved, and the covenants, &c., paying therefore, during the continuance of the demise, the yearly rent of one peppercorn, subject to the proviso for redemption hereinafter contained:" Provided always, that, if Quested should pay to the defendant the sum of 10*l.*, being one half-year's interest for the said sum of 400*l.*, on the 29th of January, 1848, and the full sum of 410*l.*, being the said principal money with another half-year's interest, on the 29th of July, 1848, without any deduction, and should observe and perform all the covenants therein contained, then the defendant should surrender and assign the premises for the residue of the term to Quested, or to such person as he should reasonably require. The indenture then contained covenants on the part of Quested to pay the principal money and interest, and the rent by the recited indenture of lease or by any indenture of renewal reserved or to be reserved, and all taxes, and to keep the covenants therein contained, and to insure from fire. And it was thereby declared and agreed, that, until default in payment of the monies thereby secured, it should be lawful for Quested to enjoy uninterrupted possession of the premises, provided, in case of default, that then, subject and without prejudice to all other rights and remedies, and all rights of foreclosure or otherwise, it should be lawful for the defendant to make sale

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and absolutely to dispose of the premises for the term thereby granted; "and out of the monies arising by such sale to pay and satisfy the said sum of 400*l*. and the interest thereof, and any other monies which shall be then due on the securities of these presents, or so much of the same principal monies and interest as shall be then due and owing, and also all costs, charges, and expenses incident to or occasioned by such sale as aforesaid." The deed then proceeded to state that it was thereby "further agreed that he the said S. Quedsted shall hold the said premises as tenant at will to the said J. Souster, his executors, administrators, and assigns, at the clear yearly rent of 150*l*., payable quarterly at [the usual quarter days]; for which rent it shall be lawful for the said J. Souster, his executors, administrators, and assigns, to distrain on the said premises or any part thereof, as landlords may for rent reserved on leases for years; but that it shall be lawful for the said J. Souster, his executors, administrators, and assigns at any time to determine such tenancy by leaving notice in writing for such purpose on the said premises or any part thereof; and that he and they shall apply the said rent, when received, after payment thereof of the said yearly rent reserved by the said lease of the said demised premises, upon and for the like trusts and purposes as hereinbefore is mentioned of and concerning the monies to be raised under the powers aforesaid." Then followed the usual covenants by Quedsted, with, amongst others, a covenant for quiet enjoyment. Quedsted subsequently demised the premises to one Sandell, who took possession and placed a board over the entrance door with the words "Sandell late Quedsted" upon it. The goods were seized on the 25th of March, 1852, for three quarters of a year's rent due from Quedsted to the defendant. It was objected on the part of the plaintiff, first, that there was no sufficient evidence of the title of the devisees to grant the lease to Muggeridge, inasmuch as there was no direct evidence of

the death of the devisor, J. W. Harper; secondly, that, upon the authority of *Walker v. Giles*(a), the clause in the deed, by which a tenancy was created, was void, as being repugnant to the intention of the parties to that instrument; and lastly, assuming that the clause in the deed did operate to create a tenancy, it was a tenancy at will, and was determined by the subdemise by the tenant at will. The learned Judge left the case to the jury, and a verdict was found for the plaintiff, with 15*l*. damages, leave being reserved to the defendant to move to set that verdict aside, and to enter a verdict for him. A rule nisi having been obtained accordingly,

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Watson and *T. Jones* shewed cause (April 22).—First, as this is a question between strangers, the defendant is bound to give strict proof of his right to distrain. He ought therefore to have established the title of the devisees, by giving direct evidence of the death of J. W. Harper, the devisor. The lease was in renewal of that granted by J. W. Harper. The defendant therefore was bound to shew the power of the devisees to make this lease. [*Parke*, B.—They were in possession at the time, and the lessee came in under them; that is *prima facie* evidence of title. *Pollock*, C. B.—The other points in the case are sounder than this.]

Secondly.—The clause in the indenture of lease of July, 1847, which is suggested to create a tenancy, is not operative. The primary object of the instrument is clearly to create a security by way of mortgage, and the clause relied upon is wholly inconsistent with and repugnant to this object. It ought therefore to be rejected: *Walker v. Giles* (a) is a direct authority upon this point. In that case, by an indenture between two shareholders of a benefit building society of the one part, and two of the trustees of

(a) 6 C. B. 662.

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the society of the other, whereby, after reciting that the shareholders were entitled to a certain sum out of the funds in respect of their shares, and that, for the security of all the payments, amounting to 840*l.*, to become due in respect of the said shares, they had agreed to execute the assurance thereby made, the two shareholders conveyed certain premises to the trustees, upon trust to permit the latter to retain possession and to receive the rents until default in payment of their contributions, with a power to the trustees to appoint a person to receive the rents in case of default, and with a power of sale in the like event. The deed contained a clause by which the shareholders agreed to become tenants to the trustees of the premises henceforth during their will, at the rent of 200*l.*, payable at the usual quarter days. The Court held that this clause could not be taken to operate as a demise, as the general scope of the deed was inconsistent with such a construction, the only object of the deed being "to give a security for the payment of the contributions." And the Court in their judgment said, that, by construing the deed to create such a tenancy, "the grantors must be deemed to have contracted to pay the contributions, *and also the rent of 200*l.* a year*; a construction manifestly contrary to the obvious intention of the parties." Now, as the primary object of the present deed is to create a mortgage, it is difficult to reconcile the clause in question with such intention. The tenancy is not to arise upon default in payment, but eo instanti on the execution of the instrument. The mortgagor would have to pay not only the interest upon the principal sum, but the rent also. [*Martin*, B.—These clauses are of very common occurrence in instruments of this description in the north of England. *Parke*, B.—We must endeavour to give effect to every word which we find, and try to make sense of each clause. In *Walker v. Giles*, the clause was rejected on the ground that its provisions could not be reconciled with the general scope

of the instrument. But I do not think that any such difficulty occurs in the present case, for the payment of rent is to go in reduction of the principal sum and interest, and the surplus, if any, is to be paid over to the mortgagor.] The deed contains the usual covenant for quiet enjoyment. [*Parke, B.*—That is subject to the right to distrain. If we were to apply the decision in *Walker v. Giles* to this deed, we should go far to shake numerous securities throughout the country.]

Lastly.—Assuming the clause to be operative, a tenancy at will only is created by it, although a yearly rent is thereby reserved, payable quarterly: *Doe v. Cox* (a). The subdemise to the defendant determined that tenancy, for the act of the tenant was inconsistent with his holding. For this position several authorities are to be found. In *Birch v. Wright* (b), *Buller, J.*, in delivering the judgment of the Court, says, "If a tenant at will leases, it determines the will." Again, "If a tenant at will grant over his estate, though the grant be void, yet it determines his will:" *Jones v. Clerk* (c). See also Co. Litt. 57. a. [*Martin, B.*—Surely the determination of the tenancy must be at the election of the lessor.] In *Turner d. Doe v. Bennett* (d), *Lord Denman, C. J.*, in delivering the judgment of the Court of error, says, "The intent of an entry is undoubtedly in many cases important; but in the case of a tenancy at will, whatever be the intent of a landlord, if he do any act upon the land for which he would be otherwise liable to an action of trespass at the suit of the tenant, such act is a determination of the will, for so only can it be a lawful and not a wrongful act." In *Dinsdale v. Iles* (e), the act was done by the landlord which determined the tenancy. Here the act was done by the

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(a) 11 Q. B. 122.
(b) 1 T. R. 378.
(c) Hardr. 47.

(d) 9 M. & W. 646.
(e) 2 Lev. 88.

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lessee on the land. [*Macnamara* referred to *Doe d. Davies v. Thomas* (a).] [*Parke*, B.—It is requisite that the landlord should give the tenant notice that he determines the tenancy, if the act relied upon be done off the premises; where the act is done on the land, it is presumed that the tenant is there, and knows of it. What is there to shew that the landlord here knew of the subdemise?] The notice posted over the door was notice to all the world of the change of tenancy. This was some evidence for the jury of the fact of notice, for the landlord's agent could not have failed to see it when he entered the premises to effect the distress.

Macnamara appeared in support of the rule, but was not called upon.

PARKE, B.—We shall not at present trouble the learned counsel to support the rule, as we have made up our minds upon the case, except upon the question whether the subdemise by the tenant at will, without more, was a determination of the tenancy. Upon that point we shall take a short time to consult the authorities. With respect to the first point, we are clearly of opinion that there was sufficient *prima facie* evidence of the devisees' title, for they were in possession at the time the lease was made, and the lessee came into possession under them. The next question is, whether a tenancy at will was created by the deed. And I think that, by the actual terms of the deed, a tenancy at will was created at the clear yearly rent of 150*l.*, payable quarterly, unless that provision is in some way either inconsistent with the general provisions of the deed, or falls within the decision of *Walker v. Giles*, in which the rule upon this subject is laid down, that effect must be given, if possible, to every word

in a deed. For that purpose we must endeavour to make sense of a disputed clause; but if it is found impossible to do so, as containing provisions irreconcilable with the other portions of the deed, such portion of the instrument must be rejected. The Court of Common Pleas, in the case of *Walker v. Giles*, looking to the general object of the deed; were unable to reconcile the stipulation by which the mortgagor agreed to pay the annual sum of 200*l*. as tenant at will, inasmuch as the general object of the deed was not to create such a demise, but only to secure the payment of the subscriptions to the club, that mortgage being given with the sole view of securing those contributions; and the Court had great difficulty in reconciling the tenancy with that intention, inasmuch as the deed did not contain any provision by which the amount paid as rent could go in satisfaction of the principal sum. But there is no such difficulty here in reconciling the provision as to the tenancy with that applying to the payment of the mortgage money, for the clause goes on to provide that the mortgagee shall apply the rent, when received, in satisfaction of principal and interest. The deed contains a proviso for redemption, with covenants for the payment of the mortgage money; and in case of payment of the whole amount due, the mortgagor will be entitled to recover back the premises. In the meantime, he is tenant at will at an annual rent of 150*l*., which is to go in reduction of the principal, and if a distress is made the amount so levied would be deducted also; and on payment of the balance, the mortgagor would also be entitled to recover back the premises; so that there is no inconsistency in this deed between the clause creating the tenancy at will and the general object of the instrument. And I am very glad that it is so, for if we were to hold otherwise, we should shake a vast number of small mortgages in this form, for I know that such clauses are frequently inserted where there exist doubts as to the solvency of the mortgagor.

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As there is no inconsistency in this clause, we need not strike it out, as the Court of Common Pleas thought themselves compelled to do in *Walker v. Giles*. Upon the other point, we shall take time to consider whether it will become necessary to hear the learned counsel in support of the rule.

MARTIN, B., concurred (a).

Cur. adv. vult.

PARKE, B., on a subsequent day (April 26), said—In this case we disposed of every point except one, and upon that we took time to consider. The action was for a distress upon the plaintiff's goods on the premises of one Qusted, who was both mortgagor and tenant at will under a deed; that deed contained a clause which we held to create a tenancy at will. It was contended, that Qusted, the tenant at will, by the transfer of his interest in the premises to one Sandell, had determined the tenancy, and consequently that the power to distrain was gone. Several cases were cited, but none of them are precisely in point. It however now seems clear, from a case in Yelverton, that the assignment by the tenant at will of his interest to a third party is no determination of the tenancy, unless the lessor at will have notice. That was so decided by the members of the Court in the case of *Carpenter v. Collins* (b). In the course of the discussion in that case it was objected, "that it does not appear that the lessee"—who was lessee at will—"was expelled by the plaintiff, who was lessor, and that no entry of a stranger upon him"—the lessee at will—" (although it be by his agreement) shall determine the lease against the lessor, for it is covin if the lessor is not privy and acquainted with it; quod fuit concessum by the other justices." The principle laid down in that case clearly is, that a tenant at will cannot determine his tenancy by transferring

(a) *Pollock*, C. B., had left the Court.

(b) *Yelv.* 73.

his interest to a third party without notice to his landlord. The distress therefore was good, and the rule to enter a verdict for the defendant must be absolute.

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Rule absolute.

JONES v. GRETTON.

May 9.

THIS was an action upon a promissory note for 40*l.* with interest, payable on demand, dated the 25th of January, 1851, and made by the defendant, one R. Day, and one T. Cotterell. The defendant, as to 14*l.* 7*s.* 6*d.*, parcel &c., pleaded the payment of that amount into Court, and as to 27*l.* 17*s.* 6*d.*, he pleaded "that before action he satisfied and discharged the plaintiff's claim by payment;" upon which plea issue was joined.

At the trial, before *Alderson*, B., at the Middlesex Sittings in the present Term, it appeared that the action was brought to recover the amount of the promissory note declared on, which had been made by one Day, and the defendant and Cotterell as his sureties. The plaintiff was a publican at Birmingham, and was the treasurer of a "Money Loan Society," which was held at his house. This society was regulated by a set of printed rules. By the 4th of these rules it was provided, "that each and every member of this society shall pay or cause to be paid to the stewards of the society for the time being, every Thursday night, between half-past seven and half-past nine o'clock, the sum of 5*s.* for each and every share he or she may hold in the society; and at the same time and place aforesaid, each and every member of this society shall pay or cause

By the rules of a money loan society it was provided, that each holder of shares should pay a certain sum per week upon each share, and that each member should take his share by sale, or for want of a purchaser by ballot; that for each share he was to receive the sum of 40*l.* when paid by the members, upon giving a security, to be approved of by the committee.

A. purchased a 40*l.* share, and by way of the security required, he gave, with two parties, a joint promissory note payable on demand, for 40*l.*, to the treasurer of the society. He continued the weekly payments regularly for some time,

and others were made by his sureties, and then default was made:- *Held*, in an action upon the note, in default of payment of the weekly sums, that the preceding payments of the weekly sums were no evidence in support of a plea of part payment of the note.

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to be paid the sum of 3*d.*, to be expended in malt liquor for the members then present, and if any member bring a stranger with him to spend 6*d.* for the same purpose extra. Any member having more than one share to spend only 3*d.*, the same as for a single share, and one tankard of ale shall be reserved till half-past nine o'clock each meeting night."

The society also granted shares of 40*l.*, and to these the preceding rule was applicable, with the exception that the weekly payment was 4*s.* instead of 5*s.* The 9th rule provided:—"That each member shall take his share by sale, or for the want of a purchaser to take the same by ballot, at the house aforesaid, and for each share or shares he or she holds in the said society shall receive the sum of fifty pounds when paid in by the members, and security approved of as hereafter mentioned; and that every member of this society shall pay the sum of 7*d.* rent or interest to the stewards on every club night, for each and every share or shares he or she receives from the said society, or continue to forfeit, according to the fifth article, for each share on every meeting-night till the same shall be paid. Shares to be sold one night previous to 50*l.* being paid in, and the purchaser to commence paying interest from the next night after such sale or ballot." The 10th rule was as follows:—"That the purchaser of each share shall propose his sureties to the secretary immediately after the sale, and give their names, occupation, and residence; and the secretary shall summon a committee to investigate and make proper inquiries as to the sufficiency and stability of the sureties proposed by each member for his or her share, and their determination to be final; that no share shall be paid out, unless the sureties proposed by each member shall be deemed safe by the whole of the committee, which shall consist of the treasurer, secretary, two stewards, and the four next members, as their names stand in the book, such committee to be allowed two

shillings; and if any member of the committee refuse or neglect to attend after due notice, he shall forfeit one shilling" (a).

Day became a member of the society in 1850; and on the 25th of January, 1851, he purchased a share therein of 40*l.*, and the promissory note in question was then given by him, with the defendant and Cotterell as his sureties. Day continued to pay the sums required with regularity up to the 2nd of April, 1852, and had then paid 22*l.* 0*s.* 3*d.* He then, however, became a defaulter, and his sureties were called upon, and several small sums were paid by them, which, together with those paid by Day, amounted together to 28*l.* 13*s.* 3*d.* Upon an application for payment of the note being made by the plaintiff's attorney, he told the defendant that the club wanted 14*l.* to settle their claim. The present action was commenced upon the following day, the plaintiff claiming the full amount of the note.

It was thereupon objected, upon the part of the plaintiff, that the payments made under the above circumstances did not support the plea, as they were not payment of the note. The learned Judge was of that opinion, and directed a verdict for the plaintiff for the amount in dispute, with leave to the defendant to move to set that verdict aside and to enter a verdict for him.

Allen, Serjt., now moved accordingly.—The payments made by the maker of the note may be treated as payments in reduction of its amount; for it was given as a

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(a) By the 17th rule it was provided "that no alteration shall be made in these articles respecting the aforesaid payments and forfeits without the consent of every member being first obtained; but if at any future time it shall appear that any new article or byelaw might be made for the better conducting of the said society's affairs, it may be made, provided it has the consent of two-thirds of the members of the society."

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security for the repayment of the loan, and of that a certain amount was satisfied. The plaintiff, therefore, can only claim upon the note the amount of the balance due. [*Alderson*, B.—The note was given to keep alive the subscriptions.] When the whole of the amount of the loan has been paid by a member, that share may be again put up for sale; but the member who has made the payments on account of the loan, does not have them restored to him. [*Alderson*, B.—The defendant will not lose his money, for he will obtain the benefit of it in the end. He may have lost the benefit of enjoying the opportunity of borrowing by purchasing other shares. *Parke*, B.—How can the defendant establish the position, that the payment of monies for a particular purpose can be applied as payments to another purpose? The plea treats them as payments of the note, whereas they were made to keep up the subscriptions.] The rules of the society are capable of modification, and the statement of the plaintiff's attorney may be taken as an admission, that a balance of 14*l.* only was due to the club with respect to this note.

PARKE, B.—I am clearly of opinion that there is no ground for a rule in this case. This is an action upon a promissory note made by the defendant, by which he promises to pay 40*l.* on demand, and the only plea to a certain portion of the amount is, that he has paid that portion. In order to support the plea, it was necessary to shew that a sum of money was paid eo nomine on account of the note; but that the defendant failed to do, for the payment in question had no reference whatever to the note. But it was said that this note was given, not for the repayment of the full amount of 40*l.*, but merely to keep up the weekly payments as required by the rules to be made by the holder of the share. If that was so, it ought to have been pleaded to the extent of 40*l.*, but if it had been, still there was no evidence of it to support such a plea. The statement by

the plaintiff's attorney that the club wanted 14*l.* only to settle their claim, is no admission whatever that the payments were made and received in satisfaction of so much due upon the note.

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ALDERSON, B.—The defendant was bound to shew that the note was satisfied. Now the evidence shewed that the note was given for the purpose of keeping up the payments until the end of the club; when the member ceased to keep these payments up the plaintiff had a right to sue upon the note.

PLATT, B.—I agree that there ought to be no rule, upon the ground that none of the payments were made on account of the note. The plea therefore was not supported.

Rule refused (*a*).

(*a*) *Martin*, B., had left the Court in the course of the argument.

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IN THE EXCHEQUER CHAMBER.

(In Error from the Court of Exchequer).

May 11.

SALOMONS v. MILLER.

Held, in the Exchequer Chamber, affirming the judgment of the Court of Exchequer—first, that, though the form of the oath of abjuration required by the 6 Geo. 3, c. 53, mentions the name of “King George” only, it is not confined to sovereigns of that name, but the name is merely used by way of describing the existing sovereign, and therefore the form must be altered from time to time by the substitution of the name of the sovereign reigning at the time when the oath is taken; secondly, that the words of the oath “upon the true faith of a Christian,” are

A WRIT of error having been brought by the defendant on the judgment of the Court of Exchequer for the plaintiff, in the case of *Miller v. Salomons* (a),

Sir *F. Kelly* (with whom were *Willes* and *A. Goldsmid*) argued for the plaintiff in error (b) (May 10 and 11).—It is not intended to rely on two of the points argued in the Court below, viz. that the 10 Geo. 1, c. 4, was in force after the 6 Geo. 3, c. 53, passed; and that, under the 1 & 2 Vict. c. 105, the defendant was bound to take the oath, which he did. But it is submitted, first, that the 6 Geo. 3, c. 53, in effect ceased on the death of George the Third, or, at all events, on the death of George the Fourth; and secondly, that whenever by law an oath is permitted or required to be taken, it not only may, but must, be taken in the form and manner binding on the conscience of the person taking it. With regard to the first point, the 6 Geo. 3, c. 53 requires the party to swear, “I will bear faith and true allegiance to his Majesty *King George*,” and the House of Commons has no authority to alter the words of the oath by substituting the name of the reigning sovereign. None of the statutes in question

a substantive part of the oath itself, and not merely part of the ceremony for administering it. Therefore, a person of the Jewish persuasion, who is elected a member of the House of Commons, and takes his seat as such after having taken the oath in the form binding on his conscience, but intentionally omitting the words “upon the true faith of a Christian,” is liable to the penalties imposed by the 1 Geo. 1, st. 2, c. 15, s. 17, (and not repealed by 15 & 16 Vict. c. 43,) on any person sitting in parliament without having first taken the oath of abjuration.

(a) 7 Exch. 475.

(b) Before Lord *Campbell*, C. J.,*Wightman*, J., *Cresswell*, J., *Williams*, J., and *Crompton*, J.

were directed against Jews, but only against Roman Catholics. The earliest enactment with reference to the oath of supremacy was the 1 Eliz. c. 1, s. 19, which required certain persons therein mentioned to be sworn on the Evangelists; and the concluding words of the oath were "So help me God, and by the contents of this book." The obligation to take that oath was extended to other classes of persons by the 5 Eliz. c. 1. The next statute was the 3 Jac. 1, c. 4, which first contained the words "upon the true faith of a Christian." The entire provisions of that statute were expressly directed against Roman Catholics. The obligation of taking that oath was extended to members of the House of Commons by the 7 Jac. 1, c. 6, s. 2; and they were prohibited by the 30 Car. 2, st. 2, c. 1, from sitting during a debate or voting until they had taken the oaths of allegiance and supremacy, and subscribed a declaration against transubstantiation. In the 1 W. & M. c. 1, which repealed the 30 Car. 2, st. 2, c. 1, and other Acts relating to the oaths of supremacy and allegiance, all the alterations were made which a change in the name of the sovereign had rendered necessary. Those forms of oath omitted the words "on the true faith of a Christian," and concluded simply with the words "So help me God." The 13 Will. 3, c. 6, is the first Act which imposed the oath of abjuration. On the demise of William the Third, the House of Commons appointed a select committee to consider what alterations were necessary to be made in the oath in consequence of the accession of Queen Anne^(a); and upon their report the 1 Ann. st. 1, c. 22, passed. That statute prescribed a form of oath similar to that in the 13 Will. 3, c. 6, merely substituting the name of Anne for that of William. If, then, the House of Commons had of itself authority to substitute the name of one sovereign for another, it would, no doubt, have done so in that instance;

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but there is in effect a legislative declaration that they had not the power; for the 1 Ann. st. 1, c. 22, recites, that, by the demise of William the Third, the form of oath had "become necessary to be altered." The 6 Ann. c. 7, s. 20, provided a form to be taken after the demise of her then Majesty, in which blanks were left for the name of her immediate successor. In the 1 Geo 1, st. 2, c. 13, those blanks were filled up with the name of George. Thus, in the successive reigns of William, Anne, and George, it was considered necessary to provide a form of oath containing the name of the reigning monarch. In consequence of the death of the Pretender in 1765, the 6 Geo. 3, c. 53, was passed. Where an oath prescribed by a statute is of a permanent nature, as where the Crown is spoken of in its corporate capacity, an alteration may be made in the form of the oath to suit the change of circumstances. But it is otherwise where the oath required is limited in its application. If a bond be given to the Crown, that enures to its successors, since from the nature of the transaction it is obviously intended for their benefit; but where an oath required by statute is of a temporary character, and limited to the then existing state of circumstances, when they change, it has no longer any application. The oath of abjuration is of a temporary character, and was directed against James the Second and his descendants [Lord *Campbell*, C. J.—No alteration was made during the reign of George the Second, or until the 6 Geo. 3, and that was in consequence of the death of the Pretender. We now abjure the descendants of James the Second when none exist. There are, however, some descendants of the Princess Henrietta, daughter of Charles the First.] It could never have been the intention of the legislature to confer upon any Court the power of determining which of two persons, in a case of disputed succession, was entitled to reign. [Lord *Campbell*, C. J.—That would apply equally to the oath of allegiance; and it is not disputed

that that oath may be administered with the necessary change in the name of the Sovereign.] It is laid down by Lord Coke (a), that "a new oath cannot be imposed upon any judge, commissioner, or any other subject, without authority of Parliament; but the giving of every oath must be warranted by Act of Parliament, or by the common law time out of mind." That rule of law was recognised and adopted in *Omichund v. Barker* (b). The Roman Catholic Emancipation Act, 10 Geo. 4, c. 7, s. 2, has substituted a new form of oath for Roman Catholics in lieu of the oath of abjuration; and section 3 expressly provides for the use of the name of the reigning Sovereign. [*Crompton*, J.—That statute says, Roman Catholics may sit and vote in Parliament on taking the prescribed oath, instead of the oaths of allegiance, supremacy, and abjuration. That seems very like a legislative declaration that the oath of abjuration must be taken by other persons.] The cases of *The Parliament in Ireland* (c) and *Rex v. Green* (d) were decided with reference to oaths not imposed under circumstances of a temporary character, but required to be perpetually taken.

Secondly.—The defendant was duly sworn, although he purposely omitted the words "on the true faith of a Christian." Every oath consists of two parts: first, the matter or thing sworn to, and to which the person swearing pledges his conscience, which is the substance of the oath; and secondly, the language and form or manner of taking it. That distinction is adverted to by Lord *Hardwicke*, C., in his judgment in *Omichund v. Barker* (e). Johnson, in his Dictionary, thus defines an oath: "An affirmation, negation, or promise, corroborated by the attestation of the Divine Being." Whatever may be the

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(a) 2 Inst. 479.

(b) Willes, 538; 1 Atk. 21.

(c) 12 Rep. 110.

(d) 1 Vent. 171.

(e) 1 Atk. 21.

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object of the oath, the matter or thing sworn to admits of no variation, but the language and manner of attestation may be varied and adapted to the religion of the swearer. A Jew may be sworn on the Old Testament, with his head covered, and in the name of Jehovah; a Hindoo may be sworn on the waters of the Ganges, or by touching the foot of a Brahmin; and a Mahometan, if such be his custom, in the name of the Prophet. The only exception is, where not only the matter sworn to but the language itself is, by express enactment, imposed as a test of conscience, which is not the case here. The words in the 6 Geo. 3, c. 53, "on the true faith of a Christian," are part of the form or ceremony of swearing, just as were the words "so help me God" in the 1 Geo. 1, st. 2, c. 13. The substance of the oath or thing sworn to is the abjuration of the family of King James the Second, and the bearing allegiance and true faith towards the house of Hanover. A person taking the oath is not called upon to swear that he is a Christian, or to swear upon the Holy Evangelists. The security which an oath can give will be best obtained by allowing each person to take it in that form most binding on his conscience. There is no option as to taking this oath. Any person who is qualified to sit in Parliament may be elected even against his will; it is nevertheless his duty to serve, but the law has imposed as a condition the taking of this oath, and if he refuses he becomes subject to most fearful penalties. [Lord Campbell, C. J.—If he were to say, I cannot conscientiously take the oath, and therefore will not take it, his seat would become vacated, and he would be subject to no penalties.] If the language of the oath may be altered by substituting the name "Queen Victoria" for that of "King George;" and if, as common sense requires, the words "I, A. B." may be changed into the name of the party taking the oath, the same principles of reason and sense will allow of the mere formal words of asseveration being varied and

adapted to the religious conscience of the swearer. The oath ends with the word "truly." The superadded reference to the Christian faith is only another form of expression for an appeal to the Divinity. That will appear by referring to the other statutes, in which the language of the attestation varies: in the 1 Eliz. c. 1, the words are "So help me God, and by the contents of this book;" in the 1 Geo. 1, st. 2, c. 13, "On the true faith of a Christian, so help me God;" in the 6 Geo. 3, c. 53, "On the true faith of a Christian." Would it have made any difference if the words in the 1 Geo. 1, had been transposed thus: "So help me God, on the true faith of a Christian;" [*Cresswell*, J.—Suppose the words of the oath in the 6 Geo. 3, c. 53, were transposed, and it began thus: "I, A. B., upon the true faith of a Christian, do truly and sincerely acknowledge, profess," &c.; and every sentence of the oath began "I, A. B., upon the true faith of a Christian;" could the oath be taken by reading it "I, A. B., upon the true faith of a Jew?"] The words, though transposed, would still be words of attestation only. [*Lord Campbell*, C. J.—Could they be changed into "I, A. B., upon the true faith of a Mormonite?" Was it not the intention of the legislature that the true faith of a Christian should be a pledge of what was sworn to?] No one who is or professes to be a Christian could substitute any other form of words. The only ground for alteration is the necessity of adapting the oath to the belief and conscience of the party taking it. By the 10th section of the 1 Geo. 1, st. 2, c. 13, two justices of the peace may tender the oath of abjuration to any person whom they may suspect to be dangerous and disaffected to the Government; and if he shall refuse to take it, he shall be adjudged a popish recusant convict, that is, he may be banished from the country; and if he return without leave from the Crown, he may be put to death as a felon. At the time that Act passed, there were many Jews of wealth and consideration in the country, and the

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legislature could never have intended that they should be subject to such severe penalties for declining to take an oath, which it was well known they could not conscientiously take. [Lord *Campbell*, C. J.—That section applies to the three oaths, of allegiance, supremacy, and abjuration. At that time there were many Roman Catholics in this country who could not, or would not, take the oath of supremacy; so that a Jew was in no worse situation than a Roman Catholic. That enactment is rather a reproach to the legislature than any canon to assist us in construing the statute in question. Shortly afterwards the legislature must have thought that the 10th section of the 1 Geo. 1, st. 2, c. 13, affected Jews; for the 10 Geo. 1, c. 4, s. 18, was passed to relieve them when taking the oath of abjuration in certain cases. Had the latter statute applied to the oath of a Jew returned to Parliament, there would have been an end of the case.] That statute may have been passed *pro majore cautela*, and to clear up doubts about the law, not to alter it. The oath was imposed as a test of political not of religious principle, and was directed against Roman Catholics, not Jews. If the words “upon the true faith of a Christian” be construed as part of the oath, an effect will be given to the 6 Geo. 3, c. 53, which was never intended, and against a class of subjects never contemplated by the legislature. The oath being susceptible of two constructions, the Court will put upon it that which is most consonant to the policy and intention of the legislature, and hold that the concluding words are capable of being modified according to the religious belief of the party swearing.

Channell, Serjt., (with whom was *Macnamara*), was not called upon to argue.

LORD CAMPBELL, C. J.—After deliberately considering the able argument of Sir *F. Kelly*, and having read the

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opinions of the Judges of the Court of Exchequer, and the arguments there urged on both sides, we think the case free from doubt. Two objections have been made to the judgment of the Court of Exchequer. The first is, that the oath of abjuration no longer subsists. If that is established, no penalty could be incurred, because there was no obligation to take the oath of abjuration upon any occasion whatever. It has been argued that, upon the death of George the Third, or at all events upon the death of George the Fourth, the Abjuration Act ceased, and that all persons have been under a delusion in supposing it to exist. We are all of opinion that the Abjuration Act exists, although there is not upon the throne a sovereign of the name of George. We think it was an Act for a permanent purpose, and that the name of the reigning sovereign was introduced to denote that, for all time to come, until the law should be altered, the oath of abjuration was to be taken to the sovereign upon the throne. It would be monstrous to suppose that, upon the death of George the Fourth, the statute ceased to operate, and yet that would be the case if the argument urged for the plaintiff in error were to prevail. There was no renewal of that statute upon the accession of George the Second or of George the Third, nor until the sixth year of that reign; but the Act of Abjuration continued to be acted on during the reign of George the Second, and in that of George the Third, until the sixth year of that monarch. And so, after the death of George the Third, the oath was taken during the reigns of George the Fourth and William the Fourth, up to the present time. Therefore, we think that the first objection wholly fails.

The next question arises upon the construction of the oath of abjuration; and it will not at all be necessary to enter minutely into the various statutes quoted and arguments adduced, for we adopt the reasoning of the majority of the Judges of the Court of Exchequer upon this point.

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We have no doubt about the law as laid down in *Omichund v. Barker*, that, where an oath is to be taken, the only question being *how* it is to be taken, it shall be taken in that form most binding on the conscience of the taker; and if this were merely a question as to the form in which the oath was to be taken, that case would lead us to the conclusion that it might be taken by a Jew according to the form most binding on his conscience. But we must look to the intention of the legislature as expressed in the Act; and the question is, is this expression "on the true faith of a Christian" a part of the oath, or is it the mere form of taking it? In the statute 1 Geo. 3, c. 13, the words "So help me God" are the form of taking the oath; but the preceding words are an essential part of the oath, viz. "I do make that recognition, acknowledgment, abjuration, reconciliation, and promise heartily, willingly, and truly, upon the true faith of a Christian." If, as suggested by my Brother *Cresswell*, the form of oath had been "I, A. B., on the true faith of a Christian, do truly and sincerely acknowledge, testify, and declare," &c., the matter would have admitted of no argument. It seems to us that this is the true construction, that this expression "on the true faith of a Christian" is an essential part of that which must be sworn to, and that no person is to be allowed to take the oath who cannot or will not say that he does so "upon the true faith of a Christian." Whatever the particular object in passing this Act of Parliament may have been, if in its construction it clearly applies to Jews as well as Roman Catholics, we cannot confine it to the latter. I feel relieved from any doubt which I might otherwise entertain (though I entertain none whatever) by the fact, to which I attach considerable importance, that successive Acts of Parliament have passed which have put a construction upon the oath by the legislature itself. The 10 Geo. 1, c. 4, shews that at that time the legislature supposed that the oath of abjuration

could not be taken by a Jew. The 18th section of that Act, after reciting that the following words are contained in the latter part of the oath of abjuration, viz. "upon the true faith of a Christian," enacts "that whenever any of his Majesty's subjects professing the Jewish religion shall present himself to take the said oath of abjuration, &c., the words 'upon the true faith of a Christian,' shall be omitted out of the said oath in administering the same to such person; and the taking the said oath by such person professing the Jewish religion without the words aforesaid, in like manner as Jews are admitted to be sworn to give evidence in Courts of justice, shall be deemed to be a sufficient taking of the abjuration oath within the meaning of this Act," &c. Upon the construction contended for by Sir *F. Kelly*, the 10 Geo. 1, c. 4, would have been wholly useless. That statute has been followed by other Acts introduced for the relief of the Jews. I myself had the honour of introducing one (a) when Mr. Alderman Salomons was elected a sheriff of London, whereby a sheriff might serve in any corporation without taking the oath of abjuration. That Act was limited to the office of sheriff; but, by a subsequent Act (b), introduced by Lord *Lyndhurst*, the same immunity was extended to all municipal officers. That would have been unnecessary if a Jew could have taken the oath of abjuration. We have only to declare what the law is, not what it ought to be. I regret that the Act ever passed so as to exclude the Jews, and my wish is that it should be repealed. But it is our duty to put the best construction we can on the Act of Parliament; and, in so doing, we entertain no doubt whatever that, according to the existing law, Jews are excluded from sitting in either House of Parliament.

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Judgment affirmed.

(a) 5 & 6 Will. 4, c. 28.

(b) 8 & 9 Vict. c. 52.

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EDGEELL, Clerk, v. BURNABY, Clerk.

In the year 1823, a piece of ground in the parish of St. Margaret, Leicester, was purchased by subscription of the inhabitants, and conveyed to the commissioners for building new

churches, who erected a chapel on part of it and inclosed the remainder for a burial ground. In 1827, the chapel and burial ground were consecrated. In 1828 an Order in Council was made and published, whereby, after reciting the 16th section of the 58 Geo. 3, c. 45, which empowers the commissioners to divide populous parishes into two or more distinct and separate parishes; also reciting the 21st section of that statute, which empowers the commissioners to divide populous parishes into ecclesiastical districts; also reciting that the commissioners had made a representation to the Crown respecting the increase of population and insufficient church accommodation in the parish; also reciting, that it appeared to the commissioners expedient that an *ecclesiastical district* should be assigned to the new chapel *under the provisions of the 59 Geo. 3, c. 134*; and that the consent of the bishop had been obtained: his Majesty ordered that the proposed *division* should be made and effected according to the provisions of the said Acts. The boundaries of the district were duly enrolled under the 58 Geo. 3, c. 143, s. 22. No Order in Council was made respecting the performance of the offices of the Church in the said chapel, or the appropriation of the fees payable in respect thereof, nor did the commissioners make any order as to whether the fees for burials, &c. were to be reserved to the incumbent of the parish, or assigned to the curate of the chapel, or whether burials, &c. should be performed in such chapel. In the year 1848, the corporation of Leicester established a cemetery within the borough, under the provisions of the 11 Vict. c. ii., by which the burial service over deceased persons removed for interment in the cemetery was to be performed by, and the fees paid to, the incumbent who might have been required to perform the service, and would have been entitled to the fees, if the interment had taken place in his parish or ecclesiastical district:—*Held*, that the Order in Council was made under the 58 Geo. 3, c. 45, s. 21, and not under the 59 Geo. 3, c. 143, s. 16; and that, upon enrolment of the boundaries, the chapelry became a separate district parish for all ecclesiastical purposes; and that, after the death of the then incumbent of the original parish, the curate of the district parish was entitled to the fees for burial, both in his parish and in respect of deceased persons removed therefrom for interment in the cemetery.

THIS was an action to recover from the defendant certain burial fees. After the issuing of the writ, the following case was, by a Judge's order made by consent, stated for the opinion of this Court:—

The plaintiff, for upwards of twelve months prior to the 8th of May, 1852, was vicar of the parish church of Saint Margaret, Leicester, in the county of Leicester and diocese

of Peterborough; and the defendant during such period was and still is perpetual curate of the district chapelry of St. George within the said parish, which district chapelry was formed as hereinafter mentioned in the year 1828.

The incumbent next before the plaintiff of the said parish church resigned his office on the 15th of October, 1850; and in February, 1851, the plaintiff was inducted into the said vicarage, and remained in it until his resignation on the 8th of May, 1852.

In the year 1823, a piece of ground in the said parish of St. Margaret was purchased with money raised by the voluntary subscription of the inhabitants of Leicester as a site for a chapel and a burial ground attached to it, and the same having been conveyed to his then Majesty's Commissioners for Building New Churches, the said Commissioners erected a chapel upon part of it, and inclosed the remainder for a burial ground; and in September, 1827, the chapel and the burial ground were both consecrated.

In the year 1827, the defendant was nominated by the then vicar of the said parish and duly appointed stipendiary curate of the said chapel, and he filled that office (being duly licensed by the bishop) until and at the time of the Order in Council hereinafter mentioned.

In the year 1828, the following Order in Council was made, and duly published in the London Gazette:—

“At the Court at St. James's, the 28th of June, 1828, present the King's most excellent Majesty in Council.—Whereas, by an Act passed in the 58th year of his late Majesty's reign (*a*), intituled ‘An Act for building and promoting the building of additional churches in populous parishes,’ it is, amongst other things, enacted (*b*), that in every case in which the Commissioners appointed for carrying into execution the purposes of the said Act shall be of opinion that it will be expedient *to divide* any parish *into two or more distinct and separate parishes* for all eccle-

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(*a*) 58 Geo. 3, c. 45.

(*b*) Sect. 16.

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siastical purposes whatever, it shall be lawful for the said Commissioners, with the consent of the bishop of the diocese in which such parish is locally situated, signified under his hand and seal, to apply to the patron or patrons of the church of such parish for his consent to make *such division*, and for such patron or patrons to signify his or their consent thereto under his hand and seal. And the said Commissioners shall, upon the consent of the said patron or patrons so signified, represent the whole matter to his Majesty in Council, and shall state in such representation the bounds by which it is proposed with such consent as aforesaid to divide such parish, together with the relative and respective proportions of glebe lands, tithes, moduses, or other endowments, which will, by such division, arise and accrue, and remain and be, within each of such respective divisions, and also the relative proportions of the estimated amount of the value or produce of fees, oblations, offerings, or other ecclesiastical dues or profits, which may accrue and arise within each of such respective divisions. And if thereupon his Majesty in Council shall think fit to direct *such division* to be made, such Order of his Majesty in Council shall be valid and good in law for the purpose of effecting such division: Provided always, that no such division of any parish into district parishes shall completely take effect until after the death, resignation, or other avoidance of the existing incumbent of the parish to be divided. And whereas by the said Act it is further enacted (a), that in any case in which the said Commissioners shall be of opinion that it is not expedient to divide any populous parish or extra parochial place into such complete, separate, and distinct parishes as aforesaid, but that it is expedient to divide the same into such *ecclesiastical districts* as they, with the consent of the bishop signified under his hand and seal, may deem necessary for the purpose of affording accommodation for the attending divine

(a) Sect. 21.

service according to the rites of the united Church of England and Ireland to persons residing therein in the churches and parochial chapels already built, or in additional churches or chapels to be built therein, and as may appear to such Commissioners to be convenient for the enabling the spiritual person or persons who may serve such churches or chapels to perform all ecclesiastical duties within the districts attached to such respective churches and chapels, and for the due ecclesiastical superintendence of such district, and the preservation and improvement of the religious and moral habits of the persons residing therein, the said Commissioners shall represent such opinion to his Majesty in Council, and shall state in such representation the bounds by which such districts are proposed to be described; and if thereupon his Majesty in Council shall think fit to direct such division to be made, such Order of his Majesty in Council shall be valid and good in law for the purpose of effecting such division." And whereas, by an Act passed in the 59th year of his late Majesty's reign, intituled, "An Act to amend and render more effectual an Act passed in the last session of Parliament for building and promoting the building of additional churches in populous parishes," further provisions are made for carrying such division into effect. And whereas the said Commissioners have made a representation to his Majesty in Council, stating that the parish of St. Margaret, Leicester, in the county of Leicester and diocese of Lincoln, contained, in the year 1821, when the last census was taken, a population of 15,409 persons, which has considerably increased since that time; that the parish church was the only consecrated place of worship in the parish, and that it affords accommodation for 1500 persons only; that the said Commissioners have caused a new chapel to be erected in the said parish, wherein accommodation has been provided for 1800 persons, including 991 free seats appropriated to the use of

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the poor; that such chapel has been consecrated, and divine service is regularly performed therein; and that it appears to the said Commissioners to be expedient for securing a due ecclesiastical superintendence of the parish, and the preservation and improvement of the religious and moral habits of the persons residing therein, *that an ecclesiastical district should be assigned to the new chapel under the provisions of the said Act passed in the 59th year of his late Majesty's reign*; and that such district should be named St. George's District, with boundaries as follows, &c. (then followed a description of the boundaries); that the consent of the bishop of the diocese had been obtained as required by the said Act passed in the 58th year of his late Majesty's reign; and humbly praying that his said Majesty would be pleased to take the said circumstance into consideration, and to make such order therein as to his Majesty should seem meet. His Majesty, having this day taken the said representation into consideration, was pleased, by and with the advice of his Privy Council, to approve thereof, and to order, as it is hereby ordered, that the *proposed division* be accordingly made and effected according to the provisions of the said Acts.

C. C. GREVILLE"

The boundaries of the district assigned to the said chapel were, on the 29th of October, 1828, duly enrolled according to the provisions of the 58 & 59 Geo. 3. No Order in Council has ever been made respecting the performance of the offices of the Church of England in the said chapel, or respecting the appropriation of fees payable in respect of the performance of such offices; nor have the Commissioners for building new churches made any order or determination whether any and what part or proportion of the fees or dues for marriages, baptisms, churchings, or burials, were to be reserved to the vicar of the said parish, or to be assigned to the curate of the said

chapel, or whether any banns of marriage should be published, or whether marriages, or baptisms, churchings, or burials should be solemnised or performed in such chapel or not. Burials, however, of persons dying within the said district have been, in fact, performed by the defendant from time to time in the consecrated burial ground attached to the said chapel. The fees payable in respect of such burials were received by the clerk of the district chapelry, and regularly paid over by him to the vicar for the time being of the parish church of Saint Margaret aforesaid, until December, 1846, when the then vicar of the said parish, the Rev. A. Irvine, died; since which period the clerk has paid them over to the defendant, who has retained them to his own use.

On the death of Mr. Irvine, the Rev. W. Anderdon was appointed vicar of the said parish, and he continued to hold this living until the 15th of October, 1850, when he resigned it, and was succeeded by the plaintiff. During the whole of Mr. Anderdon's incumbency, the fees for burials in the burial ground attached to the said district chapelry of St. George were retained by the defendant to his own use. The amount of the fees for such burials between the 15th of October, 1850, and the 8th of May, 1852, whilst the plaintiff held the vicarage, was 30*l.* 14*s.* 6*d.*, and that sum the plaintiff claims to recover in this action.

This action is also brought to recover the sum of 15*l.* 5*s.*, for other burial fees. In the year 1848, an Act of Parliament passed (11 Vict. c. ii), by which the mayor, aldermen, and burgesses of the borough of Leicester, at the council of such borough, were authorised to make and maintain a cemetery or burial-ground within the said borough. The cemetery was established and opened for interment prior to the 15th of October, 1850. The defendant, on notice being given to him from time to time for that purpose, between the 15th of October, 1850, and the

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8th of May, 1852, performed in the consecrated part of the said cemetery the burial service according to the rites of the Church of England over deceased persons removed for interment therein from St. George's district aforesaid, and upon each of such interments the defendant received the fee of 2s. 6d., amounting in the whole to 15l. 5s.

The question for the opinion of the Court is, whether the plaintiff is entitled to recover both, or either and which, of the said sums of 80l. 14s. 6d. and 15l. 5s. If the Court should be of opinion that the plaintiff is entitled to recover, judgment is to be entered for the plaintiff for the amount and costs; but if the Court shall be of a contrary opinion, judgment of nolle prosequi is to be entered.

Phipson (Cockle with him) for the plaintiff.—The plaintiff is entitled to recover the fees both for burial in St. George's district and in the cemetery. By the Church Building Act, 58 Geo. 3, c. 45, s. 16, provision is made for dividing any parish into two or more distinct and separate parishes for all ecclesiastical purposes. But in case the Commissioners shall not think that expedient, then, by the 21st section, parishes may be divided into ecclesiastical districts, to be served by curates appointed by the incumbent of the parish. The 59 Geo. 3, c. 134, s. 16 (a) enables

(a) Enacts, "That it shall be lawful for the Commissioners, in the same manner and with the like consents as are required in the case of division into ecclesiastical districts under the said recited Act or this Act, to assign a particular district to any chapel of ease or parochial chapel already existing, or to any chapel built or which may hereafter be built or acquired under the powers of the said Act or this Act; and such district shall be under

the immediate care of the curate appointed to serve such chapel, but subject nevertheless to the superintendence and control of the incumbent of the parish church; and all such curates shall be nominated by the incumbent of the parish to the bishop for his license, except where the right of nomination shall already be legally vested in any other person or persons, and in every such case by the person or persons possessing such right

the Commissioners to assign to any chapel a particular district under the immediate care of the curate, subject to the control of the incumbent of the parish; and it empowers the Commissioners, with the consent of the bishop, to determine whether any and what part of the fees for marriages, baptisms, churchings, and burials shall be assigned to the curate. Under that statute a district was assigned to this chapel in the year 1828; and the defendant, who was the original curate of the chapel, then became stipendiary curate of the district so assigned. Then, what was the condition of the defendant at that time? The Order in Council makes no provision as to fees for marriages, baptisms, churchings, or burials, and consequently those fees continued payable to the incumbent of the parish. By the 8 & 9 Vict. c. 70, s. 17, it is declared that the church of any district chapelry shall be a perpetual curacy, and the minister shall not be a stipendiary curate, but a perpetual curate, and shall not be subject to the control of the incumbent of the parish, except as to Easter

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of nomination, subject to all the laws in force relating to stipendiary curates, except as to the assigning of salaries to such curates: Provided always, that it shall be lawful for the Commissioners, with the consent of the bishop of the diocese, to determine whether any and what part or proportion of the fees or dues for marriages, baptisms, churchings, and burials, shall be assigned to any such curate, and whether the banns of marriage shall be published, and marriages, or baptisms, churchings, or burials, shall be solemnised or performed in any such chapel or not; and in any case in which marriages shall be allowed in any such chapel,

the Commissioners shall cause the boundaries of the district assigned to such chapel to be enrolled in the High Court of Chancery and in the office of the Registry of the Diocese, anything in the said recited Act to the contrary notwithstanding; and no such chapelry shall become a benefice by reason of any augmentation of the maintenance of the curate by any grant or bounty under the provisions of any Act or Acts of Parliament, or law or laws for augmenting small livings, anything in such Act or Acts of Parliament, or law or laws, to the contrary notwithstanding."

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offerings and "fees, if any, reserved to the incumbent on the assignment of such district chapelry." But although that statute converts the stipendiary curate of a district chapelry into a beneficed clergyman, there is nothing in its language which expressly or impliedly deprives the incumbent of the parish of the burial fees. There is no provision for making him compensation; and the object of the exception was to prevent his right to fees reserved on the assignment of the district chapelry from being affected by its change into a perpetual curacy. There is a broad distinction between an ecclesiastical district formed under the provisions of the 58 Geo. 3, c. 45, s. 21, and a district assigned to a chapel under the 59 Geo. 3, c. 134, s. 16, which is the case here: the former becomes an ecclesiastical district for all purposes whatever, and as a necessary incident the curate would perform the burials, marriages, &c., and be entitled to the fees; but in the latter case the Commissioners, with the consent of the bishop, are to determine whether burials, marriages, &c., shall be performed there, and if so, what proportion of the fees shall be assigned to the curate. Some light is thrown on the question by the 14 & 15 Vict. c. 97. The 6th section enacts, that where fees are not reserved, "or do not otherwise belong to the incumbent of the original parish," they shall be paid to the incumbent of the district chapelry; and the 2nd, 3rd, 4th, and 5th sections expressly provide for compensation in certain cases to the incumbent for loss of fees. The right to fees for burial in the cemetery mainly depends on the same question. By the 24th section (a) of the Cemetery Act, (11 Vict. c. ii), burial service in

(a) Enacts, "That each of the several incumbents of parishes within the said borough, which now have or shall hereafter have duly consecrated burial grounds attached to them, wherein such incumbents now are or hereafter

shall be liable to be required to perform the burial service, and entitled to the fees for interment therein, shall and he is hereby required, on convenient notice being given to him, to perform, or cause to be performed by some

the consecrated part of the cemetery is to be performed by the incumbent of the parish or ecclesiastical district, who is liable to be required to perform the burial service, and entitled to the fees for interment therein.

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Manisty for the defendant.—The Commissioners acted under the 58 Geo. 3, c. 45, s. 21, and not under the 59 Geo. 3, c. 134, s. 16; for the division was made by an Order in Council upon the representation of the Commissioners, and with the consent of the bishop, as required by the former statute. Then, by the 24th section (a) of that Act the district became a separate and distinct parish; although no burials, marriages, &c., could be solemnised therein until after the death or resignation of the then incumbent:

clergyman of the Established Church whom he may appoint, the burial service according to the rites and usage of the said Church over every deceased person removed for interment within the consecrated part of any cemetery established under the powers of this Act from the parish of such incumbent or from any ecclesiastical district taken out of such parish and not having any consecrated burial ground attached thereto, and over whose corpse the said service could have been lawfully required to be performed if the same had been interred in the burial ground of a parish church; and for every such interment, the incumbent shall be entitled to the fee or sum of two shillings and sixpence."

(a) Enacts, "That such boundaries shall continue and be the boundaries of such parishes or districts respectively, unless so

altered; and such districts shall thereupon become and be called district parishes, by such names as shall be given to them respectively in the instrument so enrolled as aforesaid, and shall become and be separate and distinct district parishes; and the churches and chapels respectively assigned to such districts shall, when duly consecrated for the purpose, become and be the district parish churches of such district parishes, for all purposes of ecclesiastical worship and performance of ecclesiastical duties, and as to all marriages, christenings, churchings, and burials, and the registry thereof respectively within the same, and in relation to all fees, oblations, and offerings, and the demanding, suing, and prosecuting for and recovering the same, and as to all other purposes whatsoever, save and except as is in this Act particularly excepted."

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(sect. 28). Upon that event, all laws and customs relating to ecclesiastical fees applied to this district: (sect. 27); and it became a separate and distinct parish for all ecclesiastical purposes whatever. Moreover, the 12th section of the 59 Geo. 3, c. 134, declares, that all churches built under the provisions of the 58 Geo. 3, c. 45, "whether belonging to parishes completely divided, or to district parishes, shall, immediately after the consecration thereof, become and be deemed to be, and be distinct benefices and churches for all ecclesiastical purposes," provided that during the then existing incumbency such churches shall be served by licensed stipendiary curates appointed by the incumbent. The 8 & 9 Vict. c. 70, s. 17, has reference to the 59 Geo. 3, c. 134, s. 16, by which the Commissioners are empowered, when they assign a particular district to any chapel, to require the curate to perform the burial and other services, and to allot him a portion of the fees. [*Platt, B.*, referred to *Gibson's Codex*, p. 452.] This is not a burial ground belonging to the original parish, but ground purchased by the parish, and conveyed to the Commissioners, so that the common law cannot apply to it. Then with respect to the fees for burial in the cemetery, the defendant is entitled to them under the 24th section of the 11 Vict. c. ii.

Phipson replied.

POLLOCK, C. B.—I am of opinion that the plaintiff is not entitled to recover either of the sums in question. Our judgment might proceed on this narrow ground, that, with reference to the 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134, the plaintiff has failed to make out any title whatever to these fees; and under the 11 Vict. c. ii, s. 24, the fees for burial in the cemetery are to be paid to the incumbent "liable to be required to perform the service in his parish or ecclesiastical district." It is, however, more satisfactory to enter into the result of the Acts of Parliament. This is a

division of a populous parish into an ecclesiastical district, under the provisions of the 21st section of the 58 Geo. 3, c. 45. The Commissioners are required to describe the boundaries of the proposed district; and, by section 22, the description is to be enrolled and registered. Then, by section 24, such districts become district parishes; and the churches and chapels assigned to such districts, when duly consecrated, become the district parish churches of such district parishes for all purposes of ecclesiastical worship, and as to all burials &c., and in relation to all fees, save as in that Act excepted. The 28th section makes an exception in favour of the then incumbent of the original parish; but, upon his death, the ecclesiastical district becomes, to all intents and purposes, a separate and distinct parish, and the curate is entitled to the fees in his own right, just as if the district had been originally a separate parish. That, in my opinion, is the law, independently of the consideration, that this is not an ancient burial ground belonging to the parish; but calling in aid that circumstance, there is stronger reason for holding that the plaintiff cannot recover, since this is a cemetery, to which the custom of England and canon law do not apply.

ALDERSON, B.—I am of the same opinion. It seems to me that the 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134, are capable of receiving a simple and plain construction. Those statutes provide for three things:—First, where the bishop and patron concur in the division of a populous parish into two or more distinct and separate parishes; then, if the Commissioners think it expedient, upon their representation the Crown is empowered to make the division. That is under the 16th section of the 58 Geo. 3, c. 45; and if that had been done in this case, it follows that the defendant would have had all the rights of an incumbent of a distinct parish. Secondly, there is a power for the Crown, upon the representation of the Commissioners, *without the consent of the*

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patron, to divide populous parishes into ecclesiastical districts. That is under the 21st section. By the 22nd section, the Commissioners are to enrol and register a description of the boundaries of the new parishes or districts; and thereupon, by the 24th section, such districts become district parishes; and the churches and chapels assigned to such districts, when duly consecrated, become district parish churches; and marriages and burials, &c., are permitted to take place therein, and the fees and oblations arising therefrom belong to the incumbent of such district parish, "except as in that Act is excepted;" and that is only during the life of the then incumbent of the original parish. The third case is under the 59 Geo. 3, c. 134, s. 16; but that enactment has a totally different object. The assignment is not to be made by the Crown, but by the Commissioners, who are empowered, with the consent of the bishop, to assign a particular district to any chapel of ease or parochial chapel. That district is to be under the immediate care of the curate of the chapel, but subject to the control of the incumbent of the parish; and the Commissioners, with the like consent, are to determine whether burials &c. are to be performed there, and whether any fees are to be paid to the curate. That is not acted upon here. The Order in Council recites the 16th and 21st sections of the 58 Geo. 3, c. 45; it then recites that the Commissioners have made a representation to the Crown, that the population of the parish has increased, and that it appears to them expedient that an ecclesiastical district should be assigned to the new chapel under the provisions of the 59 Geo. 3. But the division of the parish is not made under that statute; if it had been, the ecclesiastical district would have been under the control of the incumbent of the parish, and it would have been unnecessary to recite in the order the 58th Geo. 3, c. 45, or to apply to the Crown to exercise its power and make the division; whereas the Crown approves of the representation, and orders the pro-

posed division. Taking the Order in Council altogether, this is a division of a parish into an ecclesiastical district, under the 21st section of the 58 Geo. 3, c. 45; and consequently, upon the death of the then incumbent, the defendant, as curate of the district, was entitled to the burial fees. It follows that, under the 11 Vict. c. 11, s. 24, he is also entitled to fees for burial in the cemetery.

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PLATT, B.—I am of the same opinion. It seems to me that the right to each of these sums rests on the same ground, and that if the plaintiff is entitled to the one, he is also entitled to the other. The 8 & 9 Vict. c. 70 and 14 & 15 Vict. c. 97, may be entirely left out of the case: the rights of the parties depend on the 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134. The Order in Council recites the law on the subject, and points to the power under which the Commissioners assume to act. Where church accommodation is insufficient, the 58 Geo. 3, c. 45, affords the means of dividing a parish into two or more distinct and separate parishes, and also of dividing parishes into ecclesiastical districts. In the former case there are, in the first instance, three interests to be consulted, that of the Crown, the bishop, and the patron; in the latter case, the Crown and bishop only. If the requisite parties consent, the order itself operates as an effectual division of the parish into separate parishes. There is then another party interested, viz. the incumbent, and he is left in statu quo. That being the law, it appears that in this case the Commissioners, with the consent of the bishop, made a representation to the Crown, proposing a division of the parish; and that was approved of, and an order made, that the proposed division be effected. When the 21st section of the 58 Geo. 3, c. 45, is looked at, followed as it is by the 22nd and 24th sections, there can be no doubt that the effect of that order was to separate the portion of the parish mentioned in the order, and render it not merely a separate district, but a separate

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and distinct parish, the then incumbent of the original parish being entitled to the fees so long as he remained incumbent. The 24th section is decisive on the point. I therefore think that the plaintiff is not entitled to recover either of these fees.

MARTIN, B.—I am of the same opinion. If the 58 Geo. 3, c. 45, be carefully looked at, the case is clear. The 8th section empowers the Crown to appoint Commissioners for carrying the Act into execution. The 13th and 14th sections enable the Commissioners to grant money to parishes for building churches. Then the 16th section begins by directing what shall be done in large and populous parishes, and provides for a complete separation or division of any parish into *distinct parishes*. But, in order that the then incumbent may not thereby be deprived of his ecclesiastical dues and profits, there is a proviso that no such division shall completely take effect until after the death, resignation, or avoidance of the existing incumbent. When either of those events takes place, by the 17th section, the ecclesiastical dues and profits belong to the incumbent of each division. The 21st section provides for the division of populous parishes into *ecclesiastical districts*; and, in that case, by section 30, the division is not to affect any land, glebe, tithes, moduses, or endowments of the original parish; and the rights of the existing incumbent in respect of burials, marriages, &c., are preserved by the 28th section. The Act goes on to provide for payment of the minister out of the pew rents: section 63. That statute is not only clear, but very sensible and reasonable. The difficulty arises from the 16th section of the 59 Geo. 3, c. 134. But the object of that enactment was to enable the Commissioners to take from the existing incumbent of a parish a portion of his fees, and assign them to the curate of a chapel of ease or parochial chapel. The 8 & 9 Vict. c. 70, s. 17, deals with the state of things

under the 16th section of the 59 Geo. 3, c. 134. The local Act, 11 Vict. c. ii., merely makes a reasonable provision for services to arise in respect of burial, and gives the remuneration to the person who is bound to perform the ceremony.

Judgment of nolle prosequi.

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WHYMAN v. GARTH.

May 26.

THIS was an action of ejectment by a mortgagee.

At the trial, before *Cresswell*, J., at the last York Spring Assizes, the plaintiff's counsel produced the mortgage deed; but instead of proving its execution by the attesting witness, he called the defendant, who had been subpoenaed, and asked him whether he had not executed the deed. This question being objected to by the defendant's counsel, the learned Judge ruled that the execution of the deed could only be proved by the attesting witness, and he nonsuited the plaintiff, reserving leave to him to move to enter a verdict.

The 14 & 15 Vict. c. 99, s. 2, which renders the parties to a suit competent and compellable to give evidence, has not altered the rule of law which requires a written instrument to be proved by the attesting witness.

A rule nisi having been obtained accordingly,

Atherton shewed cause (May 23).—The question turns on the effect of the 14 & 15 Vict. c. 99, s. 2, which enacts, "that on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any Court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either vivâ voce or by deposi-

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tion, according to the practice of the Court, on behalf of either or any of the parties to the suit, action, or other proceeding." By that enactment the defendant was, no doubt, a competent and compellable witness in the suit. But it is an inflexible rule or canon of evidence, that where it becomes necessary to prove the execution of a deed, and it appears on inspection of the deed that there is an attesting witness, that primary source of evidence must in the first instance be exhausted, or its absence satisfactorily accounted for. There is nothing in the language of the statute to abrogate that rule, and there is no reason for giving it an operation which its terms do not strictly warrant. The enactment is affirmative: it defines the alteration intended to be made, leaving the law in other respects as before. If the attesting witness can be dispensed with in suits between the parties to the deed, there is no reason why the same law should not prevail in actions against strangers. For instance, in an action by the assignee of the reversion against the lessee, the execution of the lease might be proved by the lessor. [*Alderson*, B.—In *Johnson v. Mason* (a), Lord *Kenyon* is reported to have said, "that Lord *Mansfield* had once by surprise allowed a man to acknowledge his own deed in Court, without calling the subscribing witness; but he afterwards changed his opinion, and held that a party should not be allowed to acknowledge his deed until it had been proved by the subscribing witness."] So inflexible was the rule, that although a person stood by and saw the execution of the deed, his testimony was nevertheless inadmissible. The maxim, "cessante ratione legis cessat ipsa lex," does not apply in this case; since the attesting witness may be aware of facts connected with the execution of the deed not within the knowledge or recollection of the parties to it. [*Platt*, B.—Suppose a defendant omits

(a) 1 Esp. 89.

to plead "non est factum."] That is a waiver of his right to require proof of the deed: it is like an admission by a party in Court. [*Pollock*, C. B.—In *Call v. Dunning* (a), which was an action on a bond, it was held, that the answer of the defendant in Chancery to a bill filed for a discovery, in which he admitted the bond to have been executed by him, was only secondary evidence of its execution, and consequently did not dispense with the necessity of calling the attesting witness. How can the examination of a party in a Court of law be stronger than his admission on oath in a Court of equity?] *Abbot v. Plumbe* (b) and *Barnes v. Trompowsky* (c) are also authorities to shew that the presence of the attesting witness cannot be dispensed with. The only exception to the rule is, where the deed is produced by the party against whom it is used: *Bowles v. Langworthy* (d).

Hardy in support of the rule.—The case of *Abbot v. Plumbe* goes to this extent, that the admissions of a party as to the contents of a written instrument are not evidence against him. That doctrine was overruled by *Slatterie v. Pooley* (e). There Lord Abinger, C. B., says, "I have always considered it as clear law, that a party's own statements are in all cases admissible against himself, whether they corroborate the contents of a written instrument or not." The allowing a person to admit the contents of a deed ex necessitate presupposes his acknowledgment of the execution of it. In *Johnson v. Mason* (f), it does not appear that the person who acknowledged the deed was a party to the cause. The rule of evidence referred to was founded on the pre-existing state of the law; but, since the parties to an action are now compellable witnesses, the same rule ought to prevail as in Courts of equity,

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(a) 4 East, 53.
(b) 1 Doug. 216.
(c) 7 T. R. 265.

(d) 5 T. R. 366.
(e) 6 M. & W. 664.
(f) 1 Esp. 89.

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where the admission by a defendant in his answer of the execution of a deed renders it unnecessary to prove it by the attesting witness. [*Martin*, B.—That is somewhat analogous to a deed set out on oyer, which was admitted for that purpose; but if it was required to be used for any other purpose, it was necessary to prove it in the usual way.] There is no difference in principle between an admission by a party on oath in a Court of law and an admission by a defendant in his answer in Chancery. Formerly, if a party to a suit in Chancery was examined as a witness, a decree could not be taken against him; but that rule has ceased since the 14 & 15 Vict. c. 99, s. 2: *Harford v. Rees* (a), *Robinson v. Briggs* (b). [*Pollock*, C. B.—Many years after *Call v. Dunning* was decided, there was a case of *Rex v. Harringworth* (c), where, in a question of settlement, it was proposed to prove the execution of an indenture of apprenticeship by the pauper, who was a party to it. Lord *Ellenborough*, C. J., there says, “If any general rule is to prevail, this is certainly one that is as fixed, formal, and universal, as any that can be stated in a Court of justice.” He seems, however, to reject the notion, that the subscribing witnesses know most about the transaction. He says, “Others may know better or more of the transaction than they; but, inasmuch as they are the plighted witnesses, the knowledge they have upon the subject is essential, and, if it can be procured, must be forthcoming”].

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—The question in this case is, whether, since the 14 & 15 Vict. c. 92, s. 2, the execution of his deed can be proved by a party to the cause, who is subpoenaed as a witness, without calling the subscribing witness; and we are of opinion that it cannot. In saying this, I also ex-

(a) 9 Hare, App. lxx.

15th February, 1852.

(b) Cor. Vice-Chancellor *Stuart*,

(c) 4 M. & Selw. 350.

press the opinion of my Brother *Parke*, who did not hear the argument. We think that the rule of law requiring proof by the subscribing witness is so inflexible, clear, and universal, that it cannot be set aside by any reasoning, however cogent,—and certainly it must be admitted that there is considerable force in the arguments founded on the recent statute.

The cases, when carefully examined, will be found to have established, as we think, these principles as those on which our decision must turn.

The attesting witness must be called to prove the execution of a deed, for this reason, that by an imperative rule of law the parties are supposed to have agreed inter se that the deed shall not be given in evidence without his being called to depose to the circumstances attending its execution. If, therefore, the attesting witness is not called, the deed cannot be read, because this agreement cannot be broken; but any agreement may be waived by the parties to it. If, then, in the course of the proceedings in the cause, the party to the deed admits the execution, or if by his pleadings he does not require the execution to be proved, he may be very reasonably said to have waived the agreement, and the other party, accepting the waiver, does not call the attesting witness. In equity an admission in the defendant's answer is sufficient, and is a waiver of the agreement; but the bill and answer are the pleadings in equity, and an admission in the answer is the same as an admission on the pleadings at law. But here, on the pleadings, the defendant has put the execution of the deed in issue, and he is called and compelled as a witness to prove the fact. How can that be put reasonably as a waiver of the agreement, not to give the deed in evidence without calling the attesting witness? Manifestly it is no waiver at all. This rule, therefore, must be discharged.

Rule discharged.

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May 30.

DAVIES v. The MAYOR, ALDERMEN, and BURGESSES of the
BOROUGH OF SWANSEA.

The first count of a declaration stated that, by a deed between the plaintiff and the defendants, acting under the Public Health Act, 1848, as the local board of health for the borough of S., the plaintiff

THE first count of the declaration stated, that, by a certain deed between the plaintiff of the one part, and the defendants of the other part, acting under and by virtue of the Public Health Act, 1848, as the Local Board of Health in and for the borough of Swansea, the plaintiff did contract and covenant with the defendants that he, the plaintiff, would, in a good and workmanlike manner, and contracted with the defendants that he would execute and complete all the works mentioned in the specification thereto annexed, in and about the constructing a sewer in the town of S., according to the specification and a plan prepared by a surveyor; the several portions of the works to be completed on or before the times mentioned in the specification, and to the satisfaction of the surveyor. And it was provided, that if the plaintiff should, from bankruptcy, insolvency, or any other cause whatever, be prevented or delayed in proceeding with the works, or should not proceed therein to the satisfaction of the surveyor, it should be lawful for the local board, after three days previous notice signed by their clerk, to be given to the plaintiff, of their intention so to do, to employ any other person to complete the works, and, at the expiration of the notice, the deed should, at the option of the local board, become void as to the plaintiff, and the amount *then already paid* to the plaintiff should be considered the full value of the works executed by the plaintiff up to that time, and no further claim should be made by the plaintiff for contract or additional works, and the materials at that time on the premises should become the property of the local board *without further payment* for the same. And it was provided, that one fourth of the whole amount should be paid when one third of the value of the works should have been certified by the surveyor to have been completed to his satisfaction, another fourth part when two thirds of the work should have been so certified, another fourth part on completion of the work so certified, and the remaining fourth part within two months from that time. Averments, that the plaintiff in part executed the works, and was ready to complete them. Breach, that after the plaintiff had executed a part of the works, and before he had completed a third of their value, the defendants refused to permit him to complete the works. The second count was trover for the conversion of building materials. Pleas to the whole declaration: That no notice of action was given under the Public Health Act, 11 & 12 Vict. c. 63: to the first count, that, after the commencement of the works, the plaintiff did not proceed with the same according to the specification and to the satisfaction of the surveyor, whereupon the defendants by a notice signed by the clerk to the local board and delivered to the plaintiff, gave notice of their intention to proceed with the works and employ other persons; that three days after the expiration of the delivery of the notice, the deed, at the option of the defendants, became void, and the defendants did proceed with the works and employ other persons, and that by reason of the premises they refused to permit the plaintiff to complete the works. There was a similar plea to the second count, justifying the conversion of the materials for the same causes. The plaintiff demurred to the two first pleas, and to the last replied, that before the converting of the materials the plaintiff had executed a portion of the works, and was ready to complete the residue, and that no payment whatever had been made on account of the part of the works so executed. To this replication the defendants demurred:—*Held*, First, that the declaration was good, since there was an implied contract on the part of the defendants to allow the plaintiff to complete the works, subject to the provision for determining the employment in the events mentioned.

Secondly. That no notice of action was necessary under the 11 & 12 Vict. c. 63, s. 139.

Thirdly. That the power of determining the employment might be exercised before any payment was made; and, therefore, the pleas to the first and second counts were good, and the replication to the latter plea bad.

with materials sufficient and proper of their several kinds, execute, perform, and complete all and singular the works mentioned in the specification thereunto annexed, in and about the constructing a sewer or culvert in the town of Swansea, according to the said specification and the plan prepared by a certain surveyor; the several portions of the works to be completed on or before the times mentioned in the specification, and to the satisfaction of the surveyor of the said local board, to be testified by a certificate under his hand. And by the same deed it was provided and agreed that, if the plaintiff should, from bankruptcy, insolvency, or any cause whatever, be prevented or delayed in proceeding with the said works according to the said deed and the said specification, or should not proceed therein to the entire satisfaction of the surveyor, it should be lawful for the said local board, after three days' previous notice, signed by their clerk or surveyor, to be given to the plaintiff, of their intention so to do, to employ any other builder, workman, or other person to proceed with the works and complete the same; and, at the expiration of the said notice, the deed should, at the option of the local board, become void as to the plaintiff, and the amount then already paid to the plaintiff by the local board should be considered to be the full value of the works executed by the plaintiff up to the time when such notice should have expired, and no further claim whatever should be made by the plaintiff under the said deed for contract works, or additional works, which might have been done by the plaintiff up to that time; and the materials, whether prepared or unprepared, which might have been at that time on the premises, should become the property of the local board without further payment for the same. And in the said specification it was provided, that payment for the whole works should be made as follows: that is to say, one-fourth of the whole amount should be paid when one-third of the value of the works should be certi-

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fied by the surveyor to have been completed to his satisfaction; another fourth part thereof, when two-thirds of the work should have been so certified; another fourth part on the completion of the work so certified; and the remaining fourth part to be paid within two calendar months from the time when the full and satisfactory completion of the contract should be certified to the local board in manner aforesaid.—Averments, that the plaintiff commenced, and in part executed, the works, and was ready and willing to complete them upon the terms and in the time and manner in the deed and specification mentioned.—Breach, that, after the plaintiff had executed a part, and before he had completed one-third of the value of the works, and before any payment whatever, the defendants refused to permit the plaintiff to complete the works, whereby he lost great gains, &c.

The second count was in trover for the conversion of building materials, &c.

Pleas (inter alia), secondly, that the alleged grievances were committed after the 31st of August, A.D. 1848, and after the passing of the 11 & 12 Vict. c. 63, intituled The Public Health Act, 1848. That the said grievances were things done or intended to be done by the defendants, as the local board of health in and for the borough of Swansea, under the provisions of the said Act; and that no notice of action was given.

Third plea to first count, That, after the commencement of the works, the plaintiff, by some cause to the defendants unknown, and not in any way caused by the act or default of the defendants, was prevented and delayed from proceeding with, and did not proceed with, the said works according to the said deed and specification, and to the satisfaction of the surveyor, but therein wholly failed and made default; whereupon the defendants, as such local board, by a certain notice signed by the clerk to the said local board, and delivered to the plaintiff, gave notice of

their intention to proceed with the said works, and for that purpose to employ such persons as to them should seem fit; that, on the expiration of the said notice, and of three days after the date and delivery thereof, the said deed did, at the option of the defendants, become void as to the plaintiff, and the defendants did proceed with the said works according to the said notice, and did employ divers other persons to complete the same; and that, by reason of the premises, they did refuse to permit the plaintiff to complete the works, as for the causes aforesaid they might lawfully do.

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The fifth plea, which was pleaded to the second count, justified the conversion of the materials for the same causes as stated in the third plea.

The plaintiff demurred to the second and third pleas; and to the fifth replied that, before the converting of the materials, the plaintiff had executed a portion of the works, and was ready and willing to complete the residue; that no payment whatever had been made, nor had the plaintiff received any satisfaction for or on account of the part of the works so executed.

To this replication the defendants demurred(a).

Quain for the plaintiff.—The declaration discloses a good cause of action. It states a special contract on the part of the plaintiff to execute the works in manner provided, which clearly implies that the defendants will allow him to complete them. Moreover, there is an express power for the defendants to terminate the employment in certain events, which provision would be useless if they were not otherwise bound to continue to employ him. Such a stipulation conclusively shews that, sub-

(a) One of the defendants' points for argument was, that the first count of the declaration was bad in substance, inasmuch as it did not shew any legal obligation in the defendants to continue the employment of the plaintiff in the works.

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ject to that provision, this is a contract to employ the plaintiff until the completion of the works. *Pilkington v. Scott*(a) and *Hartley v. Cummings*(b) are authorities to that effect.

The second plea is bad. The Public Health Act, 11 & 12 Vict. c. 63, s. 139, requires notice of action "for any thing done or intended to be done under the provisions of that Act." That is not applicable to a contract of this kind, but has reference to a tort or a quasi tort committed in the bonâ fide exercise of the powers conferred by that statute. [*Willes*, for the defendants, admitted that this plea could not be supported.]

The third plea is also bad, and the replication to the fifth plea good. The language of the contract shews that the parties never contemplated that the power to determine it should be put in execution until after some payment had been made. It is provided that, at the expiration of the notice, the amount "*then already paid*" to the plaintiff should be considered the full value of the works executed up to the expiration of the notice; and that "no further claim" should be made by the plaintiff for additional works; and that the materials then on the premises should become the property of the defendants "without *further* payment for the same." The clause in question is of a penal nature, and ought, therefore, to receive a strict construction. Besides, it is a stipulation introduced for the benefit of the defendants, and, according to the rule of law, ought to be taken most strongly against them and in favour of the plaintiff. It is similar to an exception in a lease: *Bullen v. Denning*(c); or a policy of insurance: *Blackett v. Royal Exchange Assurance Company*(d)

Willes contra.—The third and fifth pleas are good, and the replication to the latter plea bad. Instead of the general language of the clause, which applies to any case

(a) 15 M. & W. 657.

(b) 5 C. B. 247.

(c) 5 B. & C. 842.

(d) 2 C. & J. 244.

of delay, the plaintiff would read it as if it provided, that "if at any time after the first third of the works shall be certified by the surveyor to have been completed to his satisfaction, and payment for it made," the plaintiff should become bankrupt, &c. [*Alderson*, B.—In that case there would be no provision for bankruptcy occurring before the first payment.] The other side concede that the notice might be given after the first payment; and, if so, there is nothing unreasonable in construing the words of the clause according to their plain and ordinary meaning; for less would be due to the plaintiff before than after the completion of the first third of the works. The words "amount then already paid" mean the "amount, *if any*, which has then been paid." [*Alderson*, B.—The clause as to notice would clearly apply if the plaintiff, before the first payment, was prevented by bankruptcy from doing the work.] The replication admits the notice, and that the plaintiff was guilty of delay, and shews no sufficient reason why the defendants should not exercise the power reserved to them.—He was then stopped by the Court.

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Quain replied.

POLLOCK, C. B.—Our judgment must be for the defendants on the third and fifth pleas, and for the plaintiff on the second. It is by no means clear, that, in a case like the present, there is any injustice in such a stipulation; but however that may be, we are bound to administer the law with reference to the contract of the parties, and that applies equally to a delay before or after the first payment. The words "amount then paid" mean "amount, *if any*, then paid."

ALDERSON, B., PLATT, B., and MARTIN, B., concurred.

Judgment for the plaintiff on the second plea, and for the defendants on the third and fifth pleas.

1853.

June 6.

HUNT v. HECHT.

There can be no acceptance and actual receipt of goods within the 17th section of the Statute of Frauds, 29 Car. 2, c. 3, unless the vendee has had an opportunity of judging whether the goods sent correspond with the order.

Therefore, where the defendant agreed to purchase of the plaintiff bones of a particular kind, to be separated from a heap of various bones, and gave the plaintiff a note addressed to a wharfinger to receive and ship the bones; and the plaintiff accordingly sent to the wharf some bones, which, on inspection, the defendant refused to accept, on the ground that they were not what he had gained for:—*Held*, that, although there was no acceptance to satisfy the statute.

DECLARATION for goods sold and delivered.—Plea, never indebted.

At the trial before *Martin*, B., at the London Sittings after Easter Term, it appeared that, in February last, the defendant went to the warehouse of the plaintiff, who was a bone merchant, for the purpose of purchasing some bones. The defendant there inspected a heap, consisting of ox bones, mixed with cow bones and other bones of an inferior description. The defendant objected to the latter, but verbally agreed to purchase a quantity of the other bones, to be separated from the rest, and to contain not more than fifteen per cent. of cow bones; and he directed them to be sent in sacks, bearing particular marks, to the wharf of one Barber, in Lower Thames Street. Shortly afterwards the defendant sent to the plaintiff the following shipping note:—

“Brewer’s, Chester’s, and Galley Quays,
Lower Thames Street.

“J. Barber, Wharfinger and Warehouse-keeper.

“Receive and ship per James Stuckbury & Sons, lighters, the under-mentioned goods:—

| | Mark | No. | |
|---|------|-----|--|
| “Wharf charges to be paid by Hecht Brothers, London.” | | | |

“Wharf charges to be paid by Hecht Brothers, London.”

The above shipping note was inclosed in the following letter:—

“35, Seething-lane, Feb. 7, 1853.

“Dear Sir,—We beg to inclose you shipping note for the bones, the leg bones to be marked ^{os}A, and the bullocks ^{os}B. Please fill up the quantity of bags in the shipping note, and send the goods to the wharf, latest by Wednesday morning next. Waiting your invoice stating how many bags of each sort, we are, Sir, your’s sincerely,

“Mr. A. Jarred Hunt, Lambeth. HECHT Brothers.”

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The plaintiff accordingly sent fifty bags, marked as requested, and filled up the shipping note. The bags were delivered at the wharf and received by the wharfinger on Wednesday, the 9th of February; but the defendant was not aware of their having been sent until the following day, when the invoice was received. The defendant then examined the bones, and refused to accept them, on the ground that they were not what he had bargained for. It was objected on behalf of the defendant, that there was no evidence of acceptance and receipt, to satisfy the requirements of the 17th section of the Statute of Frauds, 29 Car. 2, c. 3; and the learned Judge, being of that opinion, nonsuited the plaintiff, reserving leave for him to move to enter a verdict for the amount claimed.

Knowles, in the present Term, obtained a rule nisi, on the authority of *Morton v. Tibbett* (a); against which

Bramwell shewed cause.—There was no evidence of the acceptance and actual receipt of the goods, as required by the 29 Car. 2, c. 3, s. 17. The wharfinger was not the agent of the defendant to bind him by the acceptance of any kind of bones which might be sent; he had only authority to receive bones of the description bargained for. In *Morton v. Tibbett*, the vendee had resold the goods, so that he was no longer in a situation to say that he had not accepted them. Here the defendant repudiated the contract immediately he saw the bones.—He also referred to *Meredith v. Meigh* (b).

The Court then called on

Maude to support the rule.—There was ample evidence of an acceptance and receipt of the goods. The wharfinger was the defendant's agent for that purpose; and when the goods were delivered at the wharf, they remained at the

(a) 15 Q. B. 428.

(b) Q. B., T. T., May 26, 1853.

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risk of the vendee; and the vendor had no longer any lien on them. Some of the cases on this subject have attached a meaning to the statute inconsistent with its language. It has been considered, that so long as the vendee was in a situation to object, either to the quantity or quality of the goods, there could be no acceptance. The object, however, of the statute was not to afford protection in cases where the goods delivered did not correspond with the contract, but to prevent persons from being sued on fictitious contracts. *Morton v. Tibbett* (a) shews, that there may be an acceptance and receipt to satisfy the statute, although the contract has not been strictly fulfilled. Here, the note addressed to the wharfinger is in its terms an acceptance of the goods. [*Pollock*, C. B.—The bones were not in a condition to be accepted until a separation took place. It is like the sale of oil which requires to be measured.] *Elmore v. Stone* (b) decided, that if a person bargains for the purchase of goods, and desires the vendor to keep them in his possession for the vendee, and the vendor accepts the order, that is a sufficient delivery of the goods within the statute. The acceptance may be either before the receipt, or contemporaneous with it. The true criterion is, whether the property in the goods is changed: *Carter v. Toussaint* (c). [*Martin*, B.—*Hanson v. Armitage* (d) and *Norman v. Phillips* (e), are express authorities that a wharfinger or carrier is not the agent of a vendee, so as to bind him by acceptance of the goods.] At all events, there was evidence from which the jury might reasonably find an acceptance of the goods: *Beaumont v. Brengeri* (f), *Bushel v. Wheeler* (g).

POLLOCK, C. B.—I am of opinion that there was no evi-

(a) 15 Q. B. 428.

(b) 1 Taunt. 458.

(c) 5 B. & Ald. 855; 1 D. &
R. 515,

(d) 5 B. & Ald. 557.

(e) 14 M. & W. 276.

(f) 5 C. B. 301.

(g) 15 Q. B. 442, note.

dence of an acceptance and receipt to satisfy the requisites of the statute. All that the defendant agreed to buy was, a quantity of bones of a particular description, to be separated from others in the heap. He afterwards sent to the plaintiff a note addressed to a wharfinger, authorising the latter to receive and ship the bones; but when the defendant saw them at the wharf, he found that they did not correspond with his order, and refused to accept them. Therefore, although there was a receipt of the goods by a person who had authority from the defendant to receive them, there was no acceptance. A person cannot accept a commodity which is not in a condition to be accepted, by reason of its requiring to be separated from a larger bulk. If the contract be for the purchase of a certain quantity of flour or wheat, part of a larger quantity, there can be no acceptance until it is measured and set apart. It seems to me, that the requisites of the statute have not been complied with, and the rule must be discharged.

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ALDERSON, B.—I am of the same opinion. If a person agrees to buy a quantity of goods to be taken from the bulk, he does not purchase the particular part bargained for, until it is separated from the rest; and he cannot be said to accept that which he knows nothing of, otherwise it would make him the acceptor of whatever the vendor chose to send him; whereas he has a right to see whether in his judgment the goods sent correspond with the order. The statute requires an acceptance and actual receipt of the goods; here there has been a delivery, but no acceptance.

PLATT, B.—I am of the same opinion. Until a separation took place, the thing bargained for was incapable of being accepted.

MARTIN, B.—The question is, whether the defendant has accepted and actually received the goods bargained for.

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The contract was to buy such bones as were ordinary merchantable bones. It appears that there were various sorts of bones intermixed in a heap, and that there was no purchase of the bulk, but of a certain article to be selected from it. The defendant was only bound to accept merchantable bones; and an order is given to a wharfinger to receive those bones. No doubt in one sense the goods were received by the defendant, because they were received by a wharfinger directed by him to receive them. But the question is, whether there has been an acceptance to satisfy the statute. There are various authorities to shew that, for the purpose of an acceptance within the statute, the vendee must have had the opportunity of exercising his judgment with respect to the article sent. *Morton v. Tibbett* has been cited as an authority to the contrary; but, in reality, that case decides no more than this, that where the purchaser of goods takes upon himself to exercise a dominion over them, and deals with them in a manner inconsistent with the right of property being in the vendor, that is evidence to justify the jury in finding that the vendee has accepted the goods, and actually received the same. The Court indeed there say, that there may be an acceptance and receipt within the statute, although the vendee has had no opportunity of examining the goods, and although he has done nothing to preclude himself from objecting that they do not correspond with the contract. But, in my opinion, an acceptance, to satisfy the statute, must be something more than a mere receipt; it means some act done after the vendee has exercised, or had the means of exercising, his right of rejection.

Rule discharged.

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MASON v. HARVEY.

June 6.

ASSUMPSIT on a policy of insurance effected by the plaintiff, a pawnbroker, with the Norwich Union Fire Insurance Society. The declaration stated the insurance to be (inter alia) 150*l.* on the shop of the plaintiff, and 1000*l.* on pledges received under the 39 & 40 Geo. 3, c. 99; also that there was indorsed on the policy the following (among other) conditions (*a*):—"Eighth: Whenever any fire shall happen, the party insured shall give immediate notice thereof to one of the secretaries or agents of the society, and within three calendar months deliver to such secretary or agent, under his or her hand, accounts exhibiting the full particulars and amount of the loss sustained, estimated with reference to the state in which the property destroyed or damaged was immediately before the fire happened; and such accounts shall, if required by the directors, be supported by the oral testimony, and by the depositions or affirmations in writing of the claimant, and of his or her servants, and by the production of his or her books and vouchers." The declaration alleged that, whilst the property continued so insured, the "said shop and divers pledges received under the 39 & 40 Geo. 3, c. 99, and then being in the said shop, were damaged and destroyed by fire," &c.—Breach, that the loss which so happened has not been made good to the plaintiff.

Plea, that the plaintiff did not, within the period of three calendar months after the said shop and pledges were so damaged and destroyed by fire, deliver to any secretary or agent of the said society, under his hand, any such accounts as are in and by the eighth condition mentioned and

By a condition indorsed on a policy of insurance, it was stipulated that, in case of fire, the assured should, within three months, deliver to the secretary of the Company full particulars of the loss sustained:—*Held*, that the delivery of particulars was a condition precedent to the right of the assured to recover for the loss.

(*a*) Some of the conditions expressly declared that, in case of noncompliance with their requirements "the policy will become void."

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required, exhibiting the full particulars and amount of the loss sustained by the plaintiff as alleged, estimated with reference to the state in which the property damaged and destroyed was immediately before the fire happened by which the property was so damaged and destroyed.

Demurrer and joinder.

Unthank, in support of the demurrer.—The plea is bad in substance. A compliance with the requisitions of the condition in question is not a condition precedent to the plaintiff's right to sue on the policy, but only renders him liable to an action for his breach of duty. The case falls within the principle of the decisions, that, where a person takes an estate or benefit under a contract, subject to a duty, the law will imply an undertaking to perform it; for the breach of which an action may be maintained: *Burnett v. Lynch* (a). The language and sense of the condition are alike opposed to its construction as a condition precedent; and, moreover, it would be unjust so to construe it. Suppose the plaintiff delivered particulars of his loss, but some few of the pledges were omitted, is he on that account to be deprived of the whole benefit of the policy. [*Pollock*, C. B.—The term "full particulars" must mean the best particulars the assured can reasonably give; otherwise it might happen that, if by some inadvertence a duplicate was omitted, or mentioned as lost when in fact it was not, the assured could not recover at all.] The only case on the subject is that of *Worsley v. Wood* (b), where one of the conditions of the policy was, that persons insured should procure a certificate of the minister, churchwardens, and some reputable housekeepers of the parish, importing that they were acquainted with the character of the assured, and believed that he had really sustained the loss without fraud; and it was held that the

(a) 5 B. & C. 589.

(b) 6 T. R. 710; *S. C.*, in error, 2 H. Blac. 574.

procuring such certificate was a condition precedent to the right of the assured to recover; and that it was immaterial that the minister and churchwardens wrongfully refused to sign the certificate. In that case, however, the same injustice would not arise from construing the stipulation as a condition precedent, since it might be complied with at any time. [*Platt, B.*, referred to *Oldman v. Bewicke (a)*].

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Crowder (Brewer with him) contra.—The delivery of particulars of the loss is a condition precedent to the right of the assured to recover. *Worsley v. Wood* in effect decides this case. The assured is bound to give the best particulars which he can under the circumstances.—He was then stopped by the Court.

POLLOCK, C. B.—By the contract of the parties, the delivery of the particulars of loss is made a condition precedent to the right of the assured to recover. It has been argued that such a construction would be most unjust, since the plaintiff might be prevented from recovering at all by the accidental omission of some article. But the condition is not to be construed with such strictness. Its meaning is, that the assured will, within a convenient time after the loss, produce to the company something which will enable them to form a judgment as to whether or no he has sustained a loss. Such a condition is, in substance, most reasonable; otherwise a party might lie by for four or five years after the loss, and then send in a claim when the Company perhaps had no means of investigating it. The plaintiff may have liberty to amend by withdrawing the demurrer, otherwise judgment for the defendant.

ALDERSON, B., PLATT, B., and MARTIN, B., concurred.

Amendment accordingly.

(a) 2 H. Blac. 577, note.

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June 3.

DE BERNARDY v. HARDING.

The defendant, being about to erect seats for viewing a public funeral, entered into an agreement with the plaintiff, a foreign agent, to make the scheme known abroad, and dispose of tickets for the seats. The plaintiff was to be paid for his work and expenses by a percentage on the tickets which he sold. After the plaintiff had incurred certain expenses, but before he sold any tickets, the defendant desired him not to dispose of them, as he would sell them himself. The plaintiff accordingly sent all applicants for tickets to him, and after the funeral delivered to the defendant a bill for work done and expenses incurred. The defendant paid the expenses, but refused to pay for the work:—*Held*, that it was a question for the jury, whether

ACTION for work and labour and materials, money paid, &c.

Plea, never indebted, except as to a certain sum, and payment of that amount into Court.

At the trial, before *Alderson*, B., at the Middlesex Sittings in last Easter Term, it appeared that the defendant, being about to erect some seats over the Opera Colonnade, for the purpose of letting them to view the funeral procession of the late Duke of Wellington, entered into a special agreement with the plaintiff, who was a foreign agent, to make the scheme known abroad, and to dispose of tickets for the seats. The plaintiff was to be paid for his work and expenses by an allowance of 10*l*. per cent. on the amount of tickets sold. After he had made the necessary arrangements for the accommodation of the public, and had expended money in advertisements, employing clerks, &c., but before he had sold any tickets, the defendant desired him not to dispose of the tickets, as he would sell them himself on the spot. The plaintiff accordingly sent all applicants for tickets to him, and immediately after the funeral delivered a bill for the work done and expenses incurred. The defendant thereupon, without the plaintiff's knowledge, paid the printers and others who had been employed by the plaintiff, but refused to pay him the residue of the bill. It was objected on behalf of the defendant, that the plaintiff could not recover as upon a quantum meruit, but should have declared specially for the breach of the contract; and the learned Judge, being of that opinion, directed a verdict for the defendant, reserv-

the original contract was not rescinded by mutual consent, and whether there was not a new implied contract that the plaintiff should be paid for the work actually done as upon a quantum meruit.

ing leave for the plaintiff to move to enter a verdict for him, with 12*l.* 12*s.* damages.

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A rule nisi having been obtained accordingly, or for a new trial on the ground of misdirection,

Willes shewed cause.—The plaintiff cannot recover on the indebitatus count for the work actually done; since, there being a special contract, the law will not imply a contract to pay on request: *Ferguson v. Carrington* (a). The agreement was to allow the plaintiff a per-centage on the tickets which he sold; but he sold none. Then, if the defendant prevented him, he should have declared for a breach of the special contract. The general rule is that, if a contract has been performed by the one party, and nothing remains to be done by the other but the payment of the money, that may be recovered under the indebitatus count; but, while the contract remains unperformed, no action of indebitatus assumpsit can be brought for any thing done under it: *Fewings v. Tisdal* (b), *Crosthwaite v. Gardner* (c). The amount of damage for the breach of the special contract might have been more or less than that which is now sought to be recovered.

Hoggins and *Malcolm* in support of the rule.—The defendant having refused to perform his part of the contract, the plaintiff was entitled to treat it as rescinded, and sue on a quantum meruit: 2 Smith's Lead. Cas. 20; *Planchè v. Colburn* (d). In general, where a contract is rescinded, the work done under it must be paid for according to its value. Here the measure of value provided by the contract was rendered inapplicable by the defendant, and therefore a quantum meruit will be implied. The contract having been rescinded, no action would lie for the breach

(a) 9 B. & C. 59.

(b) 1 Exch. 295.

(c) 21 L. J., Q. B., 356.

(d) 8 Bing. 14.

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of it. At all events, there was evidence that the original contract was abandoned by mutual consent, and a new contract entered into; for the plaintiff acquiesced in the defendant's order not to sell the tickets, and the defendant paid a portion of the expenses charged by the plaintiff after having received his bill. That question ought to have been left to the jury.—They also referred to *Goodman v. Pocock* (a).

POLLOCK, C. B.—This rule must be absolute. It was a question for the jury, whether, under the circumstances, the original contract was not abandoned, and whether there was not an implied understanding between the parties that the plaintiff should be paid for the work actually done as upon a quantum meruit.

ALDERSON, B.—I also think that it ought to have been left to the jury to say whether the special contract was abandoned. Where one party has absolutely refused to perform, or has rendered himself incapable of performing, his part of the contract, he puts it in the power of the other party either to sue for a breach of it, or to rescind the contract and sue on a quantum meruit for the work actually done.

PLATT, B., concurred (b).

Rule absolute.

(a) 15 Q. B. 576.

(b) *Martin*, B., had left the Court.

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CROSSFIELD and ELIZABETH his Wife, Administratrix of
LOVELAND, v. SUCH.

June 8.

THE first count of the declaration was in detinue, as upon a bailment by the plaintiff Elizabeth of certain articles of household furniture of the intestate, to be redelivered on request. The second count was for money had and received to the use of the intestate; and the third count was for money had and received to the use of the said plaintiff as administratrix.

Pleas: (inter alia) except as to certain specified articles, non detinet, and as to the excepted articles, a plea which was demurred to, and judgment given for the defendant (a). To second and third counts, never indebted: upon which issues were joined.

At the trial, before *Martin*, B., at the London Sittings after last Hilary Term, the following facts appeared:—The female plaintiff was administratrix of a person of the name of Loveland, of whom the defendant was nephew. In the latter part of the year 1850, Loveland, who was an old man, and then in declining health, sent for the defendant, who at his request remained for some time in his house with him. Whilst there, Loveland, with the view of starting the defendant in business, sold out of the funds a sum of 125*l*., and about the same time he made a will, by which he appointed the defendant his executor, and bequeathed to him all his property, with the exception of his furniture, which he left in equal moieties to the defendant and one Goddard. This will, however, was never signed by Loveland. Subsequently Loveland, having abandoned his intention of setting up the defendant in business, gave him the 125*l*., and told him to go and buy it into the funds in

Detinue cannot be maintained by an administrator against a person who has had possession of the goods of the intestate, but has ceased to hold them prior to the grant of administration.

Where stock in the public funds is purchased in the joint names of two persons, the survivor is, *at law*, absolutely entitled to it.

(a) *Ante*, p. 159.

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the defendant's and his name jointly, at the same time saying, that then at his death the defendant would have it, and there would be no need of a will. The stock was accordingly purchased in their joint names, and so remained until Loveland's death, when the defendant sold it, and retained the money. The day after Loveland's funeral the defendant and Goddard met at his house, when the defendant produced the unexecuted will, stating that he was anxious to carry out the wishes of the deceased; and the furniture was subsequently taken away by Goddard, who left half of it at the defendant's house. It was afterwards discovered that the will was invalid, and administration of Loveland's effects was granted to his sister, the female plaintiff. The defendant then returned to her the furniture which he had received, and having pleaded such redelivery, obtained judgment on demurrer to the plea; and the administratrix now sought to recover the other portion of the furniture taken by Goddard, and also the 125*l*. It was objected on behalf of the defendant, that there was no evidence of a detention of the furniture by the defendant as against the administratrix. The learned Judge ruled otherwise, and his Lordship left it to the jury to say whether, when Loveland directed the defendant to invest the 125*l*. in their joint names, he intended to retain a control over it; and that, if so, it would not belong to the defendant at his death. The jury found a verdict for the plaintiff on the first count with 1*s*. damages, and on the other counts with 125*l*. damages, and leave was reserved to the defendant to move to reduce the verdict by the latter amount. A rule nisi having been obtained accordingly, or for a new trial on the ground of misdirection,

Montagu Chambers and *C. Pollock* shewed cause (May 23).—The administratrix is entitled to recover the 125*l*. It was properly left to the jury to say whether the deceased intended that at his death the defendant should have the

money absolutely, and they have found that he did not. The transaction could not operate as a gift in præsentibus because it is evident that the deceased intended to keep a control over the money during his life; and for the same reason it could not take effect as a donatio causâ mortis. [*Pollock, C. B.*—If a person directed his broker to purchase stock in the joint names of himself and another person, although the latter might know nothing about it, he would at law be entitled to the stock by survivorship.] In the absence of anything to explain the transaction, it would be implied that they were joint tenants, but it might be shewn that the person who invested the money never intended that the other, in case he survived, should have it for his own use. With respect to the count in detinue, the verdict was properly found for the plaintiffs. The defendant took possession of the goods, professing to act under the will.

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Lush and Prentice in support of the rule.—Upon the death of Loveland, the defendant became the absolute legal owner of the stock, and the learned Judge ought to have directed the jury that, in point of law, it vested in the defendant by survivorship. The same law prevails in the case of joint tenants, whether of land, chattels, or money. The only exception to the rule is found in the *lex mercatoria*: *Buckley v. Barber* (a). At law, the administratrix never had any title whatever to the stock or its produce, and her only remedy is in a Court of equity: *Ward v. Turner* (b). At all events, if the intent of the donor can control the rule of law, it should have been left to the jury to say whether he intended that the defendant should have the stock absolutely after his decease. The verdict on the first count is also erroneous. The issue on the plea of non detinet is, whether the defendant detains

(a) 6 Exch. 164.

(b) 2 Ves. sen. 431.

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the goods as against the plaintiff. But the moiety of the furniture now sought to be recovered was delivered up to Goddard before the grant of administration, so that the defendant never detained it as against the administratrix. He might, perhaps, be liable in trover for a conversion, but there is no evidence to support the count in detinue.

Cur. adv. vult.

POLLOCK, C. B., now said—In this case we think that the rule for a new trial ought to be absolute. The action was for detaining goods, and also for money had and received. The defendant had been named executor in a will not duly executed. Prior to the death of the maker of that imperfect will, a sum of money had been placed in the funds in the joint names of the maker of the will and the defendant. Upon the will being discovered and read, the defendant and Goddard, not adverting to the imperfect execution of it, divided between them the furniture of the deceased. The defendant took what he conceived to be his part, and Goddard the rest, in conformity with the terms of the imperfect will. The want of due execution was afterwards discovered, and the female plaintiff took out letters of administration, and sued the defendant for the goods in detinue, and for money had and received in respect of stock invested in the joint names of the intestate and the defendant. At the trial, two questions arose. One was, whether the defendant, who had delivered back the goods which he had taken, and having pleaded such re-delivery obtained judgment on demurrer to the plea, was liable in detinue for the other half which Goddard had obtained. We are of opinion that he was not, for he did not detain the goods as against the administratrix, for at the time that he had them in his possession there was no legal representative with authority either to demand or to receive them. Therefore, in what-

ever other form of action he might be liable, he cannot be sued in detinue by the administratrix for detaining goods, which, as against her, he really never did detain.

With respect to the claim for money had and received, inasmuch as the defendant and the deceased had the stock standing in their joint names, we are of opinion that, in point of law, the legal right to it was in the defendant as the survivor; and that, although he may be responsible in a Court of equity as a trustee to make such a disposal of the property as may result from any trust with which he may have been clothed, the administratrix cannot maintain against him any action for money had and received. There will, therefore, be a new trial. We have so far explained the grounds of it, in order that if the parties are disposed to settle the case without further litigation, they may be apprised by our decision of the view which we take of their respective rights.

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Rule absolute for a new trial.

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June 10.

MULES v. JENNINGS.

A testator devised to trustees his real estate in Westmoreland, upon trust, out of the rents, to pay M. an annuity of 50*l.*, and upon further trust, to pay to his grandson the rents for his life, and, after his decease, upon trust for his children, and in default of such issue, the testator gave all his estates to his nephews, their heirs and assigns, for ever, subject to the said annuity: Provided, that it should be lawful for the trustees, if thought beneficial to do so, to sell his real estate in Westmoreland; and the testator directed that the purchase-moneys should be invested by the

BY order of the Master of the Rolls, the following case was stated for the opinion of this Court.

J. Jolly, by his will, dated the 22nd of August, 1835, devised (inter alia) unto John Hawkes Mules, D. Jennings, and W. H. Turner, all his freehold and copyhold estates at Burton in Kendal, in the county of Westmoreland, upon trust, by and out of the rents and profits thereof, to pay unto the said John Hawkes Mules, for his life, an annuity of 50*l.*, and upon further trust, so long as his grandson John William Mules should be under the age of twenty-one years, to pay the residue thereof for his maintenance and education &c.; and after his said grandson should have attained his age of twenty-one years, upon further trust that the said trustees should pay to or permit his said grandson to receive the rents and profits (after payment of the said annuity of 50*l.*) for his life; and after his decease that the said trustees should stand seised and possessed of his said freehold and copyhold hereditaments, &c., upon trust for all and every the child and children of his said grandson, &c.; and in default of such issue, he gave and devised all his estates and effects to his nephews John Jolly and James Jolly, their heirs and

trustees in the purchase or on mortgage of other lands in the counties of Somerset or Devon, which lands should be settled to the same uses; and until the money arising from such sale should be so invested, the trustees should place it in the public funds, or on government or real securities in England. The testator died, leaving his grandson then an infant, and his nephews him surviving. The trustees filed a bill in Chancery to establish the trusts of the will, and take the usual accounts, and a decree was made accordingly. The Master, by his report, found that there were no debts due from the testator. Subsequently, the trustees presented a petition in the cause, stating that they were desirous that the estate in Westmoreland should be sold, and the proceeds laid out in the purchase of other lands as directed by the will, and praying that it might be referred to the Master to inquire whether it would be for the benefit of the infant grandson that the estate should be sold. An order having been made, the Master by his report found that it would be beneficial to sell the estate; and, in pursuance of an order of the Court, it was sold, and the proceeds laid out in the purchase of Bank Annuities. The grandson afterwards died without issue, and the interest of the nephews expectant on his decease vested in M. By a decree in the cause, legacies and costs were ordered to be paid, and the residue of the Bank Annuities transferred to M.:—*Held*, that the fund was not subject to legacy duty, since the person entitled to it did not take it as personality under the will, but in consequence of his election to receive a gift of real estate in the shape of money.

assigns, for ever, subject nevertheless to and charged with the payment of the said annuity of 50*l.* and certain legacies: Provided always, and the testator did thereby expressly will and direct and declare that, notwithstanding any of the uses, trusts, or limitations thereinbefore mentioned, it should be lawful for the trustees and the survivors of them, &c., at any time or times thereafter, if it should be thought beneficial or advantageous so to do, to make sale and dispose of all his freehold and copyhold messuages, lands, tenements, estates, hereditaments, and premises situate in Burton in Kendal, in the county of Westmoreland, and the fee simple and inheritance thereof, to any person or persons whomsoever, either by public auction or private contract, &c. (Then followed the usual provisions as to receipts, application of purchase-money, power to convey to the purchaser, &c.) Provided nevertheless and the testator did thereby further will, direct, and declare, that the said purchase-mones should with all convenient speed be laid out and invested by the said trustees, or the survivor of them, &c., in the purchase or purchases or on mortgage of some other messuages, lands, tenements, or other hereditaments whatsoever of inheritance in fee simple in possession, situate in the counties of Somerset or Devon, or one of them, or in some other county adjoining them, and that the other hereditaments so to be purchased as aforesaid should be settled and conveyed to and for the benefit of such and the same persons and person, to such and the same uses, upon such and the same trusts &c. as were thereinbefore expressed and declared; and that until the money arising by such sale or sales should be invested in a purchase or purchases or on mortgage in the manner thereinbefore directed, it should be lawful for the trustees and the survivors, &c., to place out such money at interest in the public funds, or on government or real securities in England, and the dividends and interest should

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go and be payable as the rents and profits of the land to be purchased would go and be payable, &c.

The testator died on the 29th of November, 1831, leaving the said John Hawkes Mules, John William Mules, John Jolly and James Jolly, him surviving. The said John William Mules was at that time an infant of the age of twelve years. On the 30th of November, 1837, D. Jennings and W. H. Turner filed their bill in the Court of Chancery against John Hawkes Mules, John William Mules, John Jolly, and James Jolly, praying that the will might be established, and the trusts thereof performed, and the usual accounts of the testator's property taken. On the 7th of July, 1840, a decree was made accordingly. In pursuance of the said decree the Master made his general report, dated the 16th of June, 1843, and thereby (amongst other things) found that there were not any debts due from the testator.

On the 12th of April, 1845, John Hawkes Mules presented a petition in the said cause, setting forth that he and his co-trustees were desirous that the estate of the testator in the county of Westmoreland should be sold, and the money obtained by such sale laid out in the purchase of other lands, as directed by the will, and praying that it might be referred to the Master to inquire whether it would be for the benefit of John William Mules that the estate should be sold. (The case then set out the affidavits in support of the petition, shewing that it would be beneficial to sell the estate). An order having been made upon the said petition, the Master by his report of the 2nd of August, 1845, (after stating certain facts) found that it would be fit and proper, and for the benefit of the said John William Mules, that the property situate in the county of Westmoreland should be sold. On the 2nd of August, 1845, an order was made in the cause confirming the said report, and directing that the said estates should be sold. In pursuance of that order the estates were sold by auc-

tion, and the proceeds laid out in the purchase of 3½ per cent. Bank Annuities. On the 17th of January, 1847, John William Mules died intestate, and without ever having been married. By virtue of indentures of the 6th of March, 1841, and 14th of July, 1848, the estate and interest of John Jolly and James Jolly under the will, expectant on the decease of John William Mules without issue, vested in John Hawkes Mules. By a decree made in the cause, dated the 25th of April, 1851, the legacies and costs were ordered to be paid, and the residue of the said Bank Annuities transferred to John Hawkes Mules.

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The question for the opinion of the Court is, whether legacy duty is payable for or in respect of the proceeds of the sale of the real estate devised by the will of the testator, and sold under the circumstances hereinbefore set forth.

Hanson for the Crown.—This money is subject to legacy duty, as money arising from the sale of land directed to be sold, within the meaning of the 55 Geo. 3, c. 184, Sched. pt. 3, tit. Legacies (a). It will be said, that the sale, though made by the trustees, was made under the direction of the Court, and therefore the statute does not apply. But the Master found that there were no debts, and consequently there was no person who could have compelled a sale. A Court of equity cannot convert the real estate of

(a) The enactment relied on is as follows: "And also for the clear residue (when given to one person) and for every share of the clear residue (when given to two or more persons) of the monies to arise from the sale, mortgage, or other disposition of any real or heritable estate directed to be sold, mortgaged, or otherwise disposed of by any will or testamentary instrument of

any person who shall have died after the 5th day of April, 1805, (after deducting debts, funeral expenses, legacies, and other charges first made payable thereout, if any,) where such residue or share of residue shall amount to 20*l.* or upwards, and where the same shall be paid, retained, or discharged after the 31st day of August, 1815."

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an infant into personalty, upon the mere suggestion that it is beneficial to him: *Calvert v. Godfrey* (a). Wherever a discretionary power to sell is vested in trustees, and they act under it, the monies arising from such sale are monies arising from the sale of real estate *directed* to be sold, inasmuch as when the power is exercised, it is the same as if the will had contained an absolute direction to sell: *Attorney-General v. Simcox* (b), *Attorney-General v. Mangles* (c). Again, it will be said, that inasmuch as the testator directs the trustees, in case of a sale, to invest the purchase-money in real estate, the money retains the character of real estate. But the trustees have a discretion, either to invest the money in the purchase of real estate or on mortgage; and until it shall be so invested, they are to place it in the public funds, or on government or real securities in England. The testator, therefore, had no idea of the money retaining the character of real estate, but left that to the discretion of his trustees; and the person absolutely entitled to the money takes it as personalty, because he came in esse at the time it was personalty. Suppose that after the conversion and before any re-investment, the tenant for life had died, and then the person entitled in the event of his death had also died, and the question had arisen between his personal representatives and heir-at-law, could it be contended that the heir-at-law was entitled to the money as real estate. The case of *Brown v. Bigg* (d), which is referred to by Alderson, B., in his judgment in *Trolley v. Seymour* (e), is an express authority, that a discretionary power of sale, when acted on, converts the real estate into personalty. [*Martin, B.*—In that case, the purchase-money was to remain personal estate.] So here, until the trustees have re-invested the money, it remains personalty. In the case of the

(a) 6 Beav. 97.

(b) 1 Exch. 749.

(c) 5 M. & W. 120.

(d) 7 Ves. 279.

(e) 2 Y. & C. 722.

Advocate-General v. Ramsay's Trustees (a), the Lord Chief Baron said, "When one considers the intention of the Acts, it is that everything which comes, or is directed to come into the hands of the donee in the shape of a money gift or bequest, should pay the tax." All the authorities on this subject were reviewed in the case of *Hobson v. Neale* (b), in which the Court of Chancery afterwards decided against the claim of the Crown, on the ground that the estate was sold, not by the trustees in the exercise of their discretionary power, but by order of the Court under its inherent jurisdiction to direct the sale of real estate to satisfy charges. It is true, that, in this case, the trustees sold under the direction of the Court, but they sold by virtue of the power contained in the will; for, unless there had been such a power, the Court could not have enabled the trustees to sell, there being no person who could have compelled a sale.

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Willes (with him *Hugh Hill*) contra.—The trustees have no discretion, but are absolutely bound to lay out the money in the purchase of real estate or on mortgage. The will directs, that the trustees shall not distribute the money as money, but shall re-invest it in a particular manner, which amounts to a gift of realty only. Suppose that immediately after the estate was sold, and whilst it was still in dubio whether the trustees would, in the exercise of their duty, re-invest the money, the Crown had claimed legacy duty, would it not have been a sufficient answer, that the money might be converted into real estate the next day, and settled to the same uses as the original estate? The donee has real estate if the trustees do not sell, and if they do, he has also real estate; in no stage has he a legacy to which the character of personal estate attaches. The trustees have done nothing inconsis-

(a) 2 C. M. & R. 224, n.

(b) 8 Exch. 368.

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tent with their exercise of the power to re-invest the money in real estate, but the person entitled to it elects to take it as money. [*Alderson, B.*—The trustees have a discretion to turn the estate either into other land or a mortgage, and they elect to do the former. Is, then, the money anything more than the vehicle by which that exchange is effected? Suppose the testator had directed that the land should be *exchanged* for other land of equal value, it is clear that that would not have been a direction to convert it into money; then, is not the direction to turn for a time the land into money, in order to purchase with that money other land, in substance the same thing?] This is not money given by will, but money which the person entitled to real estate has obtained by arrangement with his trustees.

Hanson replied.

POLLOCK, C. B.—In this case I am of opinion that legacy duty cannot be claimed. It is desirable in matters of this sort to ascertain some principle on which the right of the Crown is founded. If land be left to trustees without any direction to sell it, and the person beneficially entitled directs the trustees to sell and let him have the money, it is perfectly clear that a sale under such a direction would not subject the estate to legacy duty. So, if the will directs that the estate shall be exchanged for another estate, it is also plain that no legacy duty is payable. But if the testator directs the trustees to sell his estate and invest the money in the purchase of another estate, so that the whole of it is in the nature of real property; then if the person who is absolutely entitled to it, intermediately steps in and requires the trustees to pay over to him the produce of the sale, or obtains from them a transfer of the property, and sells it himself, is that liable to legacy duty? It seems to me that it would be an extremely inconvenient

principle to introduce, that the right of the Crown should turn upon the whim of the moment, and that the decision of to-day on the part of the individual entitled should give the Crown legacy duty; whereas if he changed his opinion to-morrow the Crown would have no such right. Suppose the money remained at a banker's for the purpose of being invested in land, what an inconvenient principle, or rather, what an absence of principle, to hold that, if the person absolutely entitled said "go on and complete the purchase," no legacy duty was payable; but if instead of that he said "give me the money," legacy duty was payable. In this case what the party takes under the will is the right to real property. For these reasons I am of opinion that, under the circumstances stated, legacy duty is not payable.

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ALDERSON, B.—I am of the same opinion. That which governs the question is, what the party takes under the will. Does the testator leave him land, or does he leave him money? If a testator leaving land directs it to be turned into money, and the money to be paid over to the legatee, it has been reasonably held that that is in truth a bequest of money and not of land. So again, by another step in the same direction, it has been held, that if the testator leaves land to trustees, with a discretionary power of turning it into money and handing it over in the shape of money to the legatee, if the trustees act under that power, legacy duty is payable, because their exercise of the power is equivalent to an original direction by the testator. Here the trustees have no power to turn the land into money and hand over the money to the legatee, but only to sell the land and convert it into other land or into a mortgage, and that is to depend upon their discretion. Then, how do they exercise that discretion? They apply to the Court of Chancery for leave to turn the land into money for the purpose of buying therewith other land,

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and of handing over, not the money, but the other land to the devisee. It is the same as if the testator had directed them to transfer the other land to the devisee; in which case, it is clear that the Crown would not have been entitled to legacy duty. That is, in substance, the case here: they having land in the intermediate stage, viz. in money, certain events happen which put it in the power of the devisee to do what he pleases with the money, and then his will, not the testator's, causes the money to be handed over to him. The Crown has no claim except where the money is handed over to the party by force of the will of the testator. Here, the money is handed over under an arrangement, in which the will of the devisee and the will of the testator co-operate.

PLATT, B.—It appears to me that the distinction pointed out by my Brother *Alderson* is the true one—viz. whether the money is taken by way of a devise of the realty, or as a bequest of personalty. If the devisee, instead of receiving this money, had taken a conveyance of the estate and then sold it, could it have been contended that legacy duty would have been payable? Then, how does this case differ from that? Here the estates are devised to trustees with power to sell them, if they think it beneficial to do so, and to invest the proceeds either in real property or on mortgage. They elect to do the former, and obtain the sanction of the Court of Chancery; but the party beneficially entitled having required them to pay over the money to him, instead of going through the farce of buying property and then selling it again, they give him the money—by his choice, not by the testator's direction. Indeed the will of the testator is opposed to such a disposition of the property. Then, how can that be said to be a legacy in pursuance of his will? It seems to me difficult to conceive a fair ground for such an argument.

MARTIN, B.—I am entirely of the same opinion. I think the point a very clear one. The will devised real estate in a certain manner; but it contained a power to the trustees, if they thought it beneficial for the cestui que trust, to sell the land and invest the produce in the purchase of other land or on mortgage. The trustees elected to sell and purchase other land, and they applied to the Court of Chancery for its sanction. The Master reported that it would be beneficial if the land was sold, and the money obtained from such sale laid out in the purchase of other land, which report was confirmed. The trustees acted on that by turning the estate into money; but while it was in money, it happened that all the beneficial interest in the property vested in an individual who elected to take the money instead of the real estate. Therefore, so far from the trustees performing the directions of the will, they acted in opposition to it. Their answer would be, that the person absolutely entitled to the money chose to release them. Their discharge was not by virtue of the will, but by the act of the party exercising a dominion over his own property. It is evident that he took the money, not under the devise, but by his own act in electing to take the estate in the shape of money, which he had a perfect right to do.

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A certificate in conformity with the above opinion was afterwards sent to the Master of the Rolls (a).

(a) There was also in the list for argument on the same day, a case of *Heal v. Knight*, where the testator devised certain real estate to trustees, with directions to sell it, and invest the money arising from such sale in the purchase of other real estate. The estate devised had been sold, and the purchase-money placed out at interest, which for some years had been paid to the person entitled to the real estate. The Court having intimated their opinion that it was clear that legacy duty could not be claimed, the counsel for the Crown declined to argue that case.

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June 10.

PALMER v. WAGSTAFFE.

Where, in an action for the infringement of a patent, the defendant relies on a general user of the supposed invention, it is sufficient to state, in his particulars of objection, under the 15 & 16 Vict. c. 83, s. 41, that the invention was used by manufacturers generally at a particular place, without naming any person or specifying any manufactory.

THIS was an action for the infringement of a patent for manufacturing candles. The defendant pleaded (*inter alia*) that the invention was not new, and delivered with this plea, pursuant to the 15 & 16 Vict. c. 83, s. 41, the following particulars of objection:—"That so much of the said invention as relates to a mode of manufacturing candles by the application of two or more wicks in each candle, at the time of the granting of the said letters patent, was not new as to the public use and exercise thereof in England, and was before that time used by the plaintiff himself at Sutton-street, Clerkenwell, and Green-street, Bethnal-green, in the county of Middlesex, and by Messrs Thomas & John Cuthbert, Henry Edwards, Messrs. Bright, Messrs. Edward Jones & Co., some or one of them, at the places hereinbefore mentioned, and by candle makers generally in London and the vicinity thereof, in and for the purpose of manufacturing candles." The plaintiff took out a summons at Chambers for the delivery of further and better particulars, on the ground that the statement of the user by candle makers in London was too general; but *Alderson*, B., before whom the summons was heard, refused to make an order.

Montague Smith obtained a rule nisi for the delivery of further and better particulars. The application was supported by an affidavit of the plaintiff's attorney, that he was advised and believed that the plaintiff could not safely proceed to trial without further definition of the acts of user thereby alleged.

Willes shewed cause.—The particular is not too general.

The 15 & 16 Vict. c. 83, s. 41 (a), only requires a statement of the "place or places" at or in which the invention is to have been used. It would have been sufficient to state that the invention was used by candle makers throughout England; whereas here the user is limited to the metropolis and its vicinity. No difficulty is imposed on the plaintiff, because, if the particular is general in its terms, the defendant will be obliged to prove at the trial a more general user; and besides, if it is not in compliance with the Act, the Judge would not allow him the costs of it under the 43rd section.

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Montague Smith in support of the rule.—The word "place" in the statute means the particular manufactory or shop in which the invention was used. If a general description such as "London" or "Southwark" is sufficient, why not such a description as the kingdom of Holland? [*Martin, B.*—It must depend on the subject-matter. Suppose an action for the infringement of a patent for greas-

(a) Sect. 41. "In any action in any of her Majesty's superior Courts of record at Westminster or in Dublin for the infringement of letters patent, the plaintiff shall deliver with his declaration particulars of the breaches complained of in the said action, and the defendant, on pleading thereto, shall deliver with his pleas, and the prosecutor in any proceedings by *scire facias* to repeal letters patent shall deliver with his declaration, particulars of any objections on which he means to rely at the trial in support of the pleas in the said action or of the suggestions of the said declaration in the proceedings by *scire facias* respectively; and at the trial of such action or proceeding by *scire facias*, no

evidence shall be allowed to be given in support of any alleged infringement, or of any objection impeaching the validity of such letters patent which shall not be contained in the particulars delivered as aforesaid: Provided always, that the place or places at or in which and in what manner the invention is alleged to have been used or published prior to the date of the letters patent shall be stated in such particulars: Provided also, that it shall and may be lawful for any Judge at Chambers to allow such plaintiff or defendant or prosecutor respectively to amend the particulars delivered as aforesaid, upon such terms as to such Judge shall seem fit." &c.

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ing the axles of railway carriages, would it not be sufficient to state that the invention was used by all the railway companies in England?] The object of requiring particulars is to let the plaintiff know to what point the evidence will be directed; but no such information is afforded by the statement, first, of a user "by certain persons named," and then a user by all candle makers in London. [*Alderson, B.*—The object of the statute was to prevent the plaintiff from being tripped up by proof of user by some person whom he did not know, and therefore of whom he could not inquire; and now it is attempted to convert that into a case where the user is notorious. If the defendant had copied into the particular the names of all the candle makers in the London Directory, that would not have given the plaintiff so much information as this mode of description, and would let in the very mischief which the Act of Parliament intended to prevent.]

ALDERSON, B.—I am of the same opinion that I was at Chambers. A defendant may rely either on a specified user by certain persons named, or on a general user by all persons at a particular place. In the former case, if he proves a user by any one of the persons named, that will support his objection; but if he rests his case on a general user, proof of a user by one person will not do. In fact, the plaintiff has no reason to complain of the generality of the statement, for the more general it is, the more the defendant must prove under it.

PLATT, B.—All that the statute requires to be given, is the "place or places" at or in which the invention is alleged to have been used. If the legislature intended a "warehouse or shop," why should they not have said so?

MARTIN, B.—Where the user is general, I do not know what a defendant can do more than is done in this case.

Rule discharged.

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WALSHE and JAMES HOWLETT v. PROVAN.

June 8.

THE first count of the declaration stated, that the plaintiffs employed the defendant, for reward in that behalf, upon the terms that the defendant should charter for the plaintiffs, at Quebec, in Canada, a ship of the plaintiffs, which was then at Quebec, called *The Empire*, and should procure a homeward cargo for the said ship, and cause the freight, which might become payable by the charterer of the said ship for the carriage of the homeward cargo, to be made payable by the charterparty to the plaintiffs, or to their agents in the United Kingdom of Great Britain and Ireland; and the defendant accepted the said employment on the said terms: and it then was the duty of the defendant to charter the said ship and to procure a homeward cargo for her, and to cause the freight that might become payable by the charterer of the said ship for the carriage of the homeward cargo to be made payable by the charterparty to the plaintiffs, or to their agents in the United Kingdom of Great Britain and Ireland. Yet, although the defendant chartered the said ship to one W. Stevenson, at Quebec, and procured a homeward cargo for her, the defendant wrongfully neglected his said duty, and caused and procured the freight payable by the said W. Stevenson for the carriage of the said cargo to be made payable by the said charterparty to the defendant, at Quebec, and then wrongfully received the said freight, and has hitherto kept the same, and refused to pay it over to the plaintiffs.—There was also a count for money received by the defendant for the use of the plaintiffs.

Pleas to the first count: first, that the plaintiffs did not employ the defendant upon the terms alleged, nor was the

The plaintiffs were owners of a ship, one of them being also a partner in the firm of H. & Co., who acted as the ship's husband. The defendant was a merchant and ship agent at Quebec, and had transactions in the way of trade with H. & Co. The ship proceeded to Quebec, with instructions from H. & Co. to the master to apply to the defendant to charter it from thence to England. At that time H. & Co. were indebted to the defendant. The defendant effected a charterparty, in which he made the freight payable to himself at Quebec, and having received the money, retained it in liquidation of the debt due to him from H. & Co. The voyage having been performed, and the freight earned:—*Held*, that the plaintiffs, as owners of the ship to which the freight was in-

cident, were entitled to recover the amount from the defendant, either under a special count for wrongfully making it payable to himself, or as money had and received by him to the plaintiffs' use.

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alleged duty of the defendant his duty as alleged; secondly, not guilty: to the second count, never indebted, and a set off.

Issues having been joined on the above pleas, the following case was, by a Judge's order, made by consent, stated for the opinion of this Court:—

In the year 1849, and until the 1st of July, 1850, Martin Howlett and the plaintiff James Howlett were the registered owners, in equal moieties, of a ship called "The Empire." On the 28th of June, 1850, Martin Howlett transferred his half of the ship to Mary Cooney; and on the 1st of July, 1850, that transfer was duly registered and indorsed on the certificate of registry.

In May, 1851, Mary Cooney died, leaving a will, under which James Walshe and Martin Howlett were appointed her executors, and as such they then became entitled to the half of the ship belonging to Mary Cooney; and in October, 1852, Martin Howlett died. From the year 1849 to the death of Martin Howlett, he and James Howlett traded under the name of Howlett & Co.; and from the year 1849 until the completion of the voyage and earning of the freight herein mentioned, the firm of Howlett & Co. were the ship's husbands of The Empire, and managed her for the owners.

The defendant was a partner in the firm of Pemberton, Brothers, merchants and ship agents, of Quebec, during the whole period before referred to, and had transactions in the way of trade with Howlett & Co.; but no intimation was given to them of such transfer to Mary Cooney, and they had no knowledge thereof until the month of July, 1852.

In the month of June, 1852, The Empire proceeded to Quebec under the command of Edward Phelan, as master, with a letter of instructions from Howlett & Co., as follows:—

"Capt. Edward Phelan, Ship 'Empire.'

"New Ross, 31st May, 1852.

"Dear Sir,—We wish you to proceed to Quebec with all

possible speed, to which port the ship is insured, and also back to a safe port in the United Kingdom. On arrival at Quebec you will call on Messrs. Pemberton, Brothers, to whom you are consigned; they will use their best endeavours to charter you at the very highest freight of the day, giving a decided preference to the ports of Newport, Cardiff, or Sharpness Point in the British Channel. If a good thing cannot be had for those ports, you are next to turn your attention to Liverpool; but you are to make yourself well acquainted on arrival with the highest current freight of the day, and Messrs. Pemberton are not to charter without first consulting with you; and mind, it is no harm for you to stir them up, and see that they will obtain the very highest figure going; and it may so happen there will be flour freights offering that may pay better than timber, see also about this particularly. You will of course save your deck load, and try by all means to stow the ship to advantage.

"Yours truly,

"HOWLETT & Co."

On the 15th of July, 1852, the vessel arrived at Quebec, and the master addressed himself with the foregoing letter to Messrs. Pemberton, Brothers, therein named. Pemberton, Brothers, accordingly procured a charterparty, which was entered into by the master, in the following terms:—

"Charterparty.—Quebec, July, 1852.

"It is this day mutually agreed between Captain Edward Phelan, master of the good ship or vessel called The Empire, &c., now lying in the port of Quebec, and William Stevenson, Esq., merchant, That the said ship, being tight, staunch, &c., shall with all convenient speed sail and proceed to a loading berth, or so near thereto as she can safely get, and there load from the factors of the said merchant a full and complete cargo of timber, say not exceeding 100 loads of hard wood, &c. The cargo to be delivered to and taken from alongside the ship, according to custom, at the

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respective ports, which the said merchant binds himself to ship, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, &c. ; and being so loaded, shall therewith proceed to Liverpool, or so near as she thereunto may safely get, and deliver same on being paid freight as follows. (It then stated the rate of freight payable). (The act of God, the Queen's enemies, &c., always excepted). The master to sign bills of lading at such rates of freight as may be required by the agents of the charterers, but without prejudice to this agreement; freight to be paid here, one-third in cash, and the remainder by approved bills at four months date, say charterers' notes, favour of Pemberton, Brothers, payable in London, agents for Messrs. Howlett & Co., New Ross, &c.

"EDWARD PHELAN.

"WILLIAM STEVENSON."

On the 17th day of July, 1852, a letter was addressed by Pemberton, Brothers, to Howlett & Co., which, after stating that they had effected the above charterparty, proceeded as follows:—"We heard with much regret from our London firm, that you had written to them, stating your inability to meet your engagements to them as our agents, amounting to about 1000*l*. To secure this large sum, we have made the freight payable here, and have received probable amount of same, say 1250*l*.; and on the arrival of The Empire, our London firm will hand over to you any balance that may be coming to you, after paying what shall have been disbursed here for the use of the ship, and what is due to both firms. It will not cause you any surprise, that, in our position, we have taken the best mode we could to secure ourselves, which we could have done by seizing the ship here; but as that would have detained the vessel until next spring, and thus have been deeply injurious to your interests, we have taken the present course, and hope that you will be of opinion that we are fully justified in doing so."

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The freight was made payable before hand in the above charterparty, for the purpose of enabling Pemberton, Brothers, to receive it at Quebec, and to retain it in satisfaction for, or in part payment of, a debt due to them by Howlett & Co.; and Pemberton, Brothers, before this action, received and still retain the freight mentioned in the charterparty, amounting to 1187*l.* 16*s.* 4*d.*; and the voyage therein mentioned was afterwards performed, and the freight earned, before the commencement of the action. Whilst The Empire was at Quebec, Pemberton, Brothers, there made the necessary disbursements for the ship, amounting to the sum of 262*l.* 0*s.* 7*d.*

The question for the opinion of the Court is, whether the plaintiffs are entitled to recover in the present action. If yea, judgment is to be entered for the plaintiffs by confession for 925*l.* 15*s.* 9*d.* If nay, judgment of non-pros is to be entered.

Willes for the plaintiff (*C. Pollock* with him).—It makes no difference whether the plaintiffs treat their claim as one for damages, arising from the defendant's breach of duty in making the freight payable in the first instance to themselves at Quebec, or whether the plaintiffs sue for the freight as money received by the defendant to their use; in either case they are entitled to recover. Supposing that Howlett & Co. had been owners of the entire vessel, and had acted on their own behalf, they would have been entitled to recover, for the master had no authority to enter into such a charterparty, and therefore his act could not bind the owners: *The Sir Henry Webb* (a). According to ordinary mercantile usage, freight ought to be made payable at the end of the voyage, and in the meantime it remains at the risk of the owner. But, assuming that this

(a) 13 Jur 639.

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charterparty has not been entered into contrary to mercantile usage, at all events Pemberton, Brothers, have received freight, which is properly payable to the owners of the vessel, and they are bound to shew some special reason for detaining it. It is a general rule, that where an agent acts for an undisclosed principal, the latter may intervene and assert his right: *Smith's Mercantile Law*, p. 143, 4th edition. Thus, where an application is made to a member of a firm for a loan, and he advances money in which the partners are interested, an action may be brought by all the members of the firm: *Alexander v. Barker* (a), *Garrett v. Handley* (b). All part-owners must join in an action for freight, for they are partners with respect to the concerns of the ship: *Abbott on Shipping*, 116, 8th edit.; *Hatsall v. Griffith* (c).

Hugh Hill for the defendant.—The real question is, whether there was any contract between the plaintiffs and the defendant. It is submitted that there was not. The contract was with Howlett & Co., and the defendant was merely in the position of sub-agent, there being no privity between him and the plaintiffs. Prior to this transaction, there had been dealings between Pemberton, Brothers, and Howlett & Co., and nothing was disclosed to the former to lead them to suppose that there was to be any difference in the mode of dealing. *Sims v. Brittain* (d) is an authority in point. There, A., B., and others, were owners of a ship in the service of the East India Company. B. was managing owner, and employed C. as his agent for general purposes, and, amongst others, to receive and pay monies on account of the ship; and C. kept a separate account in his books with B. as such managing

(a) 2 C. & J. 133.
 (b) 4 B. & C. 664.

(c) 2 C. & M. 679.
 (d) 4 B. & Ad. 375.

owner. To obtain payment of a sum of money due from the East India Company on account of the ship, it was necessary that the receipt should be signed by one or more of the owners besides the managing owner; and, upon a receipt signed by B. and one of the other owners, C. received, on account of the ship, 2000*l.* from the East India Company, and placed it to B.'s credit in his books as managing owner. The part owners having brought money had and received to recover the balance of that account, it was held, that C. had received the money as the agent of B., and was accountable to him for it; that there was no privity between the other part owners and C., and consequently that the action was not maintainable. Also in *Ireland v. Thomson* (a), where the master of a damaged ship employed a person to sell her for the benefit of the owners, it was held, that the person employed might lawfully pay over the proceeds of the sale to the master. The Court there expressed a doubt, whether the owners could have maintained an action for the money, even if they had intervened before payment, inasmuch as there were strong reasons for considering the person employed a mere sub-agent. In that case, the Court recognised the doctrine laid down in *Pinto v. Santos* (b), where it was held, that bankers, who had received from an agent the proceeds of a ship which belonged to different persons in different shares, with notice of the agency of the party from whom the money was received, and of the rights of those who were entitled to it, were liable to account to the agent only from whom they received the money, notwithstanding the intervention of the plaintiff, who was entitled to the largest share.

Willes replied.

(a) 4 C. B. 149.

(b) 5 Taunt. 447.

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POLLOCK, C. B.—I am of opinion that the plaintiffs are entitled to recover. This is simply a claim for freight by the owners of a vessel against a broker employed to effect a charterparty, and who made the freight payable in the first instance to himself, and received the money. Then the question is, to whom is he to account? It appears to me that he is responsible to the present claimants, either under the special count or the common count, for he ought not to have made the freight payable to himself, but in the ordinary way; and having received the money, he is liable to the plaintiffs in an action for money had and received to their use. The plaintiffs are owners of the entire vessel, and it was not competent for the defendant to procure the captain to execute a charterparty which excluded the right of the owners to freight, which is incident to the vessel. This case is distinguishable from *Sims v. Brittain* (a) and *Ireland v. Thompson* (b), because in those cases there was no contract between the defendants and the plaintiffs, but the former were merely in the situation of sub-agents. The present defendant must have known perfectly well that he was employed substantially on the part of the owners of the vessel; and the fact of his having had dealings with Howlett & Co. might have been struck out of the case. Without travelling through the authorities, it appears to me that, upon the simple statement of facts, the plaintiffs are entitled to recover.

ALDERSON, B., concurred.

PLATT, B.—The party employed must be taken to have known that he was doing service for the benefit of the owners of the vessel, and not of Howlett & Co., the ship's husband. It was his duty to have made the freight paya-

(a) 4 B. & Ad. 375.

(b) 4 C. B. 149.

ble according to ordinary mercantile usage; but in breach of that duty he enters into a charterparty, by which he reserves payment to himself—I should say fraudulently, because he was not authorised to do so, either by the ship's husband or the owners, and consequently he ought to be accountable to the persons who have sustained a loss through his misconduct. The first count is proved, because the contract with the plaintiffs has been broken by the defendant entering into a charterparty different from the ordinary terms; and as the defendant has received the freight which properly belongs to the plaintiffs, the damages will be commensurate.

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MARTIN, B.—I am of the same opinion. The relation between the parties is this: The plaintiffs are the owners of the ship, Howlett & Co. the ship's husband, and the defendant a merchant and ship agent at Quebec. No doubt that any contract between the ship's husband and ship agent, with respect to the management of the ship, is a contract which belongs to the principal; and in respect of any breach of that contract it is competent for the owner of the ship to sue, just as a person for whose benefit a contract is made may recover damages for the breach of it. *Sims v. Brittain* only decided, that if several joint-owners allow one of them to deal with their money and place it in the hands of a banker to his separate account, the banker may treat that as a contract with the one individual. In *Pinto v. Santos*, the defendant, a banker, received a sum of money, the proceeds of the sale of a ship and cargo belonging to several persons, from their agent, and in such case there is no doubt that an agent employing a banker, with respect to the property of several other persons, cannot impose upon the banker so many contracts as there are owners of the property. *Gibbs, C. J.*, there says, "This is not like the case of one man paying

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into a bank a sum of money belonging to one other person." In truth, that is a case which occurs every day. It is the common practice for numerous persons to send their cattle to a particular salesman, who perhaps sells them to one individual; but that is only one contract with the salesman, and each separate owner could not bring an action against the purchaser for the price of his cattle. This case, however, is totally different; and I am clearly of opinion that the plaintiffs are entitled to recover.

Judgment for the plaintiffs (a).

(a) See the following case.

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To an action for freight due upon a charterparty, the defendant pleaded, that the plaintiff entered into the charterparty as the master of the vessel, and for and on behalf and as agent for the owner; that the plaintiff never had any beneficial interest in the charterparty, nor had he any lien whatever on the freight; and that he brought the action solely as agent and trustee for the owner. The plea then proceeded to state that the owner was indebted in a certain sum to the defendant, which he thereby offered to set off against the plaintiff's demand:—*Held*, that such debt was not "a mutual debt between the plaintiff and the defendant," within the true meaning of the statutes of Set-off, 2 Geo. 2, c. 22, s. 13, and 8 Geo. 2, c. 24; and therefore that the plea was bad. The statutes of Set-off are confined to legal debts between the parties, their sole object being to prevent cross actions between the same parties.

THIS was an action on a charterparty, for freight. The declaration stated, that it was agreed by charterparty, between the plaintiff, therein described as the master of the ship *Clio*, and the defendant, that the said ship should proceed to certain places in the sea of Azof (in the charterparty mentioned), and load a cargo of tallow, &c., to discharge the same at certain ports (also mentioned) at a certain freight, one half of such freight to be paid in cash on unloading and right delivery of the cargo, and the remainder by approved bills on London, at three months date, or in cash, less discount, at 5*l.* per cent. per annum, at merchant's option. The declaration then proceeded to state the loading of the vessel with a complete cargo, and the unloading thereof at the port of discharge, the amount of the

freight, that the defendant had notice, and that, although the defendant had paid the plaintiff one-half the amount of the freight, yet he had not paid the residue, or satisfied the plaintiff's claim by approved bills.

The defendant pleaded, as to 87*l*. 6*s.*, parcel of such residue, that the plaintiff entered into the charterparty as the master of the vessel for and on behalf and as agent of one Carl Gustaff Wolff, the owner; and that the plaintiff has no beneficial interest in the charterparty, and has no lien whatever on the residue of the freight or any part thereof; and that the plaintiff has brought this action solely as agent and trustee of the said owner; and that at the time the residue of the freight became due and payable, the defendant gave the plaintiff notice that he elected to pay the residue of the freight in cash less discount, at &c., and not by bills; and further, that at the time when the residue of the freight became due and payable, the said C. G. Wolff was and still is indebted to the defendant in an amount equal to the said sum of 86*l*. 6*s.* The plea concluded by offering to set off that amount in the usual way.

Demurrer, and joinder.

The demurrer was argued in last Easter Term (May 4) by

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Unthank in support of the demurrer.—The plea is bad. The declaration is founded upon an express contract between the parties on the record, and the plaintiff is entitled to sue upon it without reference to his actual interest in the charterparty, by the terms of that instrument, on the delivery of cargo over the side of the vessel. The plea states, that the plaintiff sues as trustee and agent only; but it does not allege that the plaintiff had ever any notice of the set off, or that he has ever been required to allow the amount in reduction of his claim. The plea does not bring the case within the 2 Geo. 2, c. 22, s. 13,

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upon which it is founded. That section enacts, "that where there are mutual debts between the plaintiff and defendant, one debt may be set against the other." The debts, in order to be set off, must therefore be mutual debts between the parties upon the record; for, except for that construction, no effect would be given to the express words of the section, which requires the debts to be "between the plaintiff and the defendant." The defendant may rely upon the authority of *Bottimley v. Brook* (a) and *Rudge v. Birch* (a). The former was an action of debt on bond; to which the defendant pleaded that the bond was given for securing 100*l.* lent to him by one E. C., and that the bond was given by her direction to the plaintiff in trust for her; and that E. C., before action brought, was indebted to the defendant in more money than the amount of the bond; and a demurrer was withdrawn by the advice of the Court of Common Pleas. The second case was similar. But in *Wake v. Tinkler* (b), Lord *Ellenborough*, C. J., said that he was more inclined to restrain the doctrine of those cases; and in *Tucker v. Tucker* (c), *Littledale*, J., denied that they were law; and *Parke*, J., said, that if the words of the statute had been looked at, those cases would hardly have been decided as they were. So that these decisions cannot be considered as binding. [*Parke*, B.—If payment were made to the principal, that might be taken as payment to the agent.] That would be so; but set off stands upon a different footing, inasmuch as it is a mere statutory remedy. The allegation in the plea that the plaintiff is the mere agent of the owner of the ship does not affect the question. The allowance of the set off would work much injustice to the plaintiff, who has no means of knowing whether or not the defendant's claim is correct. The debt may not have existed at the

(a) Cited in *Winch v. Keeley*, 1 T. R. 621, 622.

(b) 16 East, 38.

(c) 4 B. & Ad. 745.

time the goods were delivered from the vessel. It is admitted that, where a contract is entered into by an agent as apparent principal, the real principal cannot, by intervening and by bringing the action in his own name, preclude the defendant from availing himself of a set off for a debt due by the agent: *Gordon v. Ellis* (a), *Carr v. Hinchliff* (b).

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Mellish contra.—The defendant does not place any reliance upon the cases of *Bottimley v. Brook* and *Rudge v. Birch*. [*Parke, B.*—They must be considered as overruled.] The defendant however contends that, according to the true construction of the statutes of set off, all mutual debts may be set off. The terms “mutual debts” are to be understood to mean, that whatever is due in point of law from one party to the other in the same right may be set off. The effect of the statute cannot be eluded by the right a party may have of electing to sue in his own name or in that of his agent, by whom the contract was made on his behalf. But where a party sues in the name of his agent, every defence which the defendant would have had if the principal himself had sued, is open to him; for example, he may avail himself of payment, release, or the fraud of the principal, as answers to the action. Several authorities might be cited for this position. In *Atkinson v. Cotesworth* (c), it was held, that where the owner had demanded and had received the freight from the charterer, the commander could not maintain an action for it, although he had given the charterer notice not to pay it to any one but himself. It is contended in the present case for the plaintiff, that the 2 Geo. 2, c. 22, s. 13, applies only to mutual debts between *the plaintiff and the defendant*. That statute, which was a temporary one only, was followed by the 8 Geo. 2, c. 24, s. 8, by which it was

(a) 2 C. B. 821. (b) 4 B. & C. 547. (c) 3 B. & C. 647.

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made perpetual. By section 8 of the latter Act, "mutual debts" may be set off. The language of that statute shews that the legislature did not intend that the benefit of the enactment was to be strictly confined to the plaintiff and the defendant upon the record, for those words are omitted. Now a party cannot, by virtue of his right to elect which name he shall adopt as that of the plaintiff in the cause, oust the defendant of this statutory privilege. Nor can the plaintiff, by suing one party instead of two, preclude the defendant so sued from pleading a set-off due from the plaintiff to himself and the party not made a co-defendant: *Stackwood v. Dunn* (a). The case of *Coppin v. Craig* (b) is a direct authority in the defendant's favour. That was an action by an auctioneer for the price of certain goods, upon which he had lost his lien by parting with them; and it was held that the purchaser was entitled to set off a debt due to him from the owner of the goods. The same principle was followed in *Coppin v. Walker* (c) and *Jarvis v. Chapple* (d). Where the party parts with his lien the debt is, in point of fact, not his. This plea states that the plaintiff is a mere agent, and has no interest whatever in the contract. But where the party has a lien in order to set off a debt due by the principal, it becomes necessary to shew that the agent has represented that he had no lien. In *Story on Agency*, sect. 404, the defences afforded by payment and set-off are rested upon the same principle. *Carr v. Hinchliff* (e) is an authority that a debt may be set off, although it be due by a party who is not the plaintiff upon the record.

Unthank in reply.—The defendant is bound to bring his case within the statute of set-off, as this remedy is a mere statutory one. The words of the 2 Geo. 2, c. 24, s. 13, ex-

(a) 3 Q. B. 822.

(b) 7 Taunt. 242.

(c) 7 Taunt. 237.

(d) 2 Chit. Rep. 387.

(e) 4 B. & C. 547.

pressly confine the remedy to mutual debts between the plaintiff and the defendant. *Stackwood v. Dunn* (a) proceeded upon the ground that the debts were mutual. The debt upon which the plaintiff there sued was a joint debt. The case of payment to the principal is not analogous to the present; for where the principal accepts the amount of his debt, his agent cannot turn round and say that the payment is no answer to a claim which is satisfied. But here the principal does not intervene: it is the act of the debtor. *Coppin v. Craig* (b) was not strictly a case of set-off. There the plaintiff, who was an auctioneer, had sold certain goods belonging to B. as the goods of A., and the Court held that it was such a fraud upon the defendant that the latter was entitled to set-off against the plaintiff's claim a debt due to him from A., for the simple reason, that the plaintiff ought not to be allowed to dispute the fact as he had represented it. So in *Carr v. Hinchliff* (c), the plea stated that the goods were sold by the principal, and that the defendant did not know that they were the plaintiff's. He, therefore, had purchased them on the faith of having his right of set-off undisturbed.

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Cur. adv. vult.

The judgment of the Court was now delivered by

MARTIN, B.—This is a demurrer to a plea. The declaration was upon a charterparty of the ship *Clio*, and alleged that the defendant had not paid to the plaintiff certain freight, which had become due and payable to him under it.

The plea was as to 87*l.* 6*s.* parcel of this freight; and it stated, that the plaintiff entered into the charter as master of the ship, and for and on behalf of and as agent for the owner one Carl Gustaf Wolff; that the plaintiff never had

(a) 3 Q. B. 822.

(b) 7 Taunt. 243.

(c) 4 B. & C. 547.

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any beneficial interest in the charter, and had no lien whatever on the freight or any part of it, and that he brought the action solely as agent and trustee for Wolff; and after another averment, not material to the present question, the plea proceeded to allege that Wolff was indebted to the defendant to the amount of 87*l.* 6*s.*, and claimed to set it off. To this plea there was a demurrer.

The case was argued before us last Term by Mr. *Unthank* and Mr. *Mellish*. Mr. *Unthank*, in support of the demurrer, contended, that, as the plea was bad at common law, and could only be supported by virtue of the statute of set-off (*a*), inasmuch as the plaintiff in the action was not the debtor to the defendant, the case was not within the statute. Mr. *Mellish*, on the other hand, admitted that the plea was bad at common law, but contended that the statute had received a construction in several cases, which he cited, and to which we shall presently refer; and that, upon such construction, the plea could be maintained.

The statute enacts, "That where there are mutual debts between the plaintiff and the defendant one debt may be set against the other." This is the whole enactment as applicable to the present case, and upon its true construction the question depends. If the words of the statute had been, that where there were "mutual debts" the one might be set against the other, the argument of Mr. *Mellish* would have had more weight; but those are not the only words, for the debts are to be mutual debts between the plaintiff and the defendant, and there is no debt here due from the plaintiff at all; and except the words "between the plaintiff and the defendant" can be excluded, the plea cannot be maintained.

In support of his view, Mr. *Mellish* cited the case of *Coppin v. Craig* (*b*), where a plea in substance the same

(*a*) 2 Geo. 2, c. 22, s. 13; 8 Geo. 2, c. 24, s. 5. (*b*) 7 Taunt. 243.

as the present was pleaded. The plea was not demurred to, and its validity or non-validity in point of law seems never to have been considered at all, and the matter decided by the Court was quite collateral to the present question. So also a case of *Jarvis v. Chapple* (a), where a similar plea was pleaded, was relied on. That was an action by an auctioneer for goods sold and delivered, and the defendant pleaded that the plaintiff sold as agent for one Tappinger, who was indebted to the defendant, which debt was pleaded as a set-off. The plaintiff replied, that the goods were not the goods of Tappinger, and were not sold by the plaintiff as his agent; upon which issue was joined. The plaintiff was nonsuited at the trial, and the application to the Court was to set aside this nonsuit. It is at once, therefore, obvious that the present question could not, by possibility, have arisen under such circumstances.

The case of *Carr v. Hinchliff* (b), and several other cases decided on the same principle, were also cited. It is quite true that there are expressions in the judgments of the learned Judges in that case which seem to support Mr. *Melish's* argument; but the real ground upon which that and many other cases proceeded, decided on the same point, is, that where a principal permits an agent to sell as apparent principal, and afterwards intervenes, the buyer is entitled to be placed in the same situation at the time of the disclosure of the real principal, as if the agent had been the real contracting party, and is entitled to the same defence, whether it be by common law or by statute, payment or set-off, as he was entitled to at that time against the agent, the apparent principal. The cases of *Carr v. Hinchliff*, *George v. Claggett*, *Rabone v. Williams, &c.*, are all explained on that principle in *Tucker v. Tucker* (c). By this case, and that of *Wake v. Tinkler* (d), and a case referred

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(a) 2 Chit. Rep. 387.

(b) 4 B. & C. 547.

(c) 4 B. & Ad. 750.

(d) 16 East, 36.

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to by *Marryatt*, (*Lane v. Chandler* (a)), the cases of *Bottimley v. Brook* (b), and *Rudge v. Buck* (b), must be considered as entirely overruled; and the case of *Tucker v. Tucker* goes far to shew that the statute of set-off is confined to the legal debts between the parties, the sole object of the statute being to prevent cross actions between the same parties.

The case of *Stackwood v. Dunn* (c) was cited on behalf of the defendant. It is enough to say, that this case goes much beyond that. In that case, it seems to have been ruled that, the demurrer having confessed the truth of the pleas, the parties to the suit ought to be considered those who are alleged in the plea, and so the set-off was between the parties. The cases cited in Story on Agency, page 361, sect. 409, as the authorities for what is there stated, are those already adverted to from 7 Taunt. 237 and 243, and have been shewn not to support the general proposition.

In this case the party whom the defendant agreed to pay was the plaintiff, but the plaintiff was not the party who agreed to pay the defendant the debt sought to be set off; and we think that, looking at the plain words of the statute, we best give effect to the true rule now adopted by all the Courts at Westminster for its construction, by holding that, inasmuch as the debts are not mutual debts between the plaintiff and the defendant, the one cannot be a set-off against the other.

This is acting upon the rule as to giving effect to all the words of the statute, a rule universally applicable to all writings, and which, we think, ought not to be departed from except upon very clear and strong grounds, which do not, in our opinion, exist in this case.

Judgment for the plaintiff

(a) 7 East, 153.

(b) 1 T. R. 622.

(c) 3 Q. B. 822.

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WILLIAMS v. HOLMES and Others.

May 26.

TROVER for goods.

Pleas—First, not guilty by statute; and secondly, that the goods were not the plaintiff's.—Upon which issues were joined.

At the last Liverpool Assizes, the following facts appeared:—The defendant Holmes, being the owner of certain premises, consisting of a building and a yard attached to it, by lease, dated the 2nd of May, 1851, demised the same to one Marshall for the term of five years, at the yearly rent of 100*l.*, "to become due and payable in advance, if demanded, by equal quarterly payments, on the 15th of June, the 15th of September, the 15th of December, and the 15th of March respectively in every year; the first quarterly payment to become due in advance, and to be paid, if demanded, on the 15th of June" then next, with a proviso that "if the yearly rent hereinbefore reserved, or any part thereof, shall be in arrear and unpaid for the space of twenty-one days next after any of the days hereinbefore appointed for payment thereof in advance, being first lawfully demanded upon or at any time after the said twenty-one days, and not paid when demanded," the plaintiff in such case might re-enter. Marshall entered upon the occupation of the demised premises under the lease, and carried on his business there as a builder for some time; but in the summer of 1851 he quitted the country for Australia, having made an arrangement with one Hill, an auctioneer, by which the latter was to occupy the yard for his business as an auctioneer, and to sell certain building materials belonging to Marshall. Hill advertised the sale of the goods by public auction; and on the 21st of July, 1852, the plaintiff bought a considerable quantity of the goods at the auction, and he authorised Hill to re-sell, on his account,

Goods deposited in an open yard belonging to premises in the occupation of an auctioneer, for the purpose of being sold by public auction, are privileged from distress.

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the goods which were to remain on the premises. On the 13th of August, Hill advertised the sale of the plaintiff's goods; but, on the 17th, the defendant Holmes, hearing that Marshall had left the country, demanded the quarter's rent for the quarter ending the 15th of June then past, and upon the tenant's refusal to pay, he distrained the plaintiff's goods, which were lying in the yard. The goods were afterwards sold under the direction of Holmes by the other defendants.

It was contended, on the part of the plaintiff, first, upon the authority of *Brown v. Arundell* (a), that the goods, being upon an auctioneer's premises for the purpose of sale, were privileged from distress; and secondly, that, under the terms of the lease, the quarter's rent claimed as due in advance on the 15th of June was not due, as no demand had been made on the previous quarter day. The learned Judge, being clearly of opinion that the authority cited upon the first point was in the plaintiff's favour, directed the jury in conformity with that view of the case; and the plaintiff obtained a verdict for 7*l.* 9*s.* 6*d.*

Edward James in last Term obtained a rule nisi for a new trial, on the ground of misdirection.

Wilkins, Serjt., and *Cowling* shewed cause.—First, the goods were privileged from distress. They were upon premises in the occupation of an auctioneer; and whether his title was good or not is altogether immaterial, as the privilege is recognised for the protection of the public, and not for the mere personal advantage of the auctioneer. *Brown v. Arundell* (a) is a direct authority in the plaintiff's favour. The Court there held, that the auctioneer's title to the premises, which were occupied by him in that character, does not in any way affect the question of pri-

(a) 10 C. B. 54.

vilege. [*Pollock*, C. B.—*Adams v. Grane*(a) embodies the same principle, and is to the same effect. The law on the question of privilege from distress was much considered by this Court in *Muspratt v. Gregory*(b).] The fact that, at the time these goods were taken, the auction was not being carried on, does not destroy the exemption.

Secondly, at the time of the distress the rent was not due. The question depends upon the meaning of the lease. According to the terms of this instrument, there ought to be a demand of the rent upon each quarter day. The demand is a condition precedent to the rent being due and payable. If, then, the rent is not demanded on the 15th of June, as to that quarter it ceases to be a forehand rent, and is not payable until the 15th of the September following. [*Martin*, B.—In Co. Litt. 202. a., it is said, “If a rent be granted payable at a certain day, and if it be behind and demanded, the grantee shall distrain for it. In this case the grantee need not demand it at the day; but if he demand it any time after, he shall distrain for it, for the grantee hath election in this case to demand it when he will, to enable him to distrain.”] Clauses of this description are always strictly construed by the Courts: *Mallam v. Arden*(c), 18 Vin. Abr. “Rent,” (P. a) pl. 12. [*Alderson*, B.—I think that the meaning of the clause is, that the rent shall become due and payable in advance, but shall not be actually paid unless demanded. That construction gives effect to the whole instrument; but as the decision of the case may depend upon the determination of the first question, it is unnecessary to give any opinion upon this point.]—They were then stopped by the Court.

Edward James and *Milward*, in support of the rule.—These goods were not privileged. Where goods are sent to

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(a) 1 C. & M. 380. (b) 1 M. & W. 633. (c) 10 Bing. 299.

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an auction room to be sold by public auction, they are not distrainable; but the same privilege does not exist where they remain in a yard, which is separated from the rooms where the business of the auctioneer is carried on. It is laid down in *Gilbert on Distresses* (a): "The cattle and goods of a guest at a public inn are privileged, because an inn is *publici juris*, and every man has a right to put up at it." And he then proceeds to say: "The cattle and goods must be actually within the premises of the inn itself to be exempted from distress, and not in any place the tenant may have removed them to for his convenience," citing *Croser v. Tomlinson* (b). That case is as follows: "A racehorse distrained for rent at a stable on Barnet Common, half a mile distant from the inn: the stable no part of the inn—horse distrainable." [*Pollock*, C. B.—The Court seem there to have decided the question on the ground that the stable where the horse was distrained was no part of the inn. But here the yard itself was used by the auctioneer for the purposes of his trade. If an innkeeper were to say to a person applying for accommodation: "My house is full, but I can obtain you a lodging across the street," I think that those premises would be as much privileged as the inn itself.] In *Brown v. Arundell* (c), the Court of Common Pleas seem to think that the auctioneer's title does not affect the question. The defendants here were prepared with evidence to shew that the auctioneer was in possession collusively, and but for the course which the cause took at the trial, they might have given evidence to establish the fact.

POLLOCK, C. B.—I am of opinion that this rule ought to be discharged. It was moved upon two points; but upon one of them it becomes unnecessary to give any opinion, as the Court stopped the learned counsel who shewed cause,

(a) Page 35.

(b) Barn. 472.

(c) 10 C. B. 54.

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and we have not heard the whole of the argument; and the decision of the other point is sufficient of itself to dispose of this action. I am of opinion that as these goods were upon the premises for sale by the auctioneer, they were not liable to be distrained. The case of *Brown v. Arundell* decides, that even in the case where an auctioneer is an absolute trespasser, having no right to be on the premises, and is there in violation of the covenants contained in the lease, and without the leave of any person having authority to let the premises, the goods are privileged from distress. The ground of that exception to the general rule of distress is, the convenience and benefit of trade, and that the public may not lose their goods by having them distrained for rent due for the premises to which they have sent them, for the purpose of having something done to them, as in the case of corn sent to a miller to be ground, or cloth sent to a tailor to be made into clothes. That principle is clearly laid down in *Brown v. Arundell*, and the present case falls precisely within it. It is, however, urged on behalf of the defendants, that they were prepared to shew that the occupation of the auctioneer was not *bonâ fide*, but that they were precluded from doing so by the course which the cause took. But there was no point of that kind made, either at the trial, for the learned Judge who tried the cause has no note to that effect, or in moving for the rule, and therefore we cannot now take cognisance of any such objection.

ALDERSON, B.—I am of the same opinion. The only question which we have now to consider is, whether, in point of law, these goods were privileged from distress. And I am of opinion that they were. If goods are sent to an auctioneer's to be sold, they are not distrainable. This is well established, and the reason of the rule is, that it is for the benefit of trade that persons are not, by sending their goods, to be permitted to fall into a trap, or that the

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purchaser should be precluded from getting his goods. If the rule were otherwise, trade could not be carried on. It is for the good of the public that in such case the interest of the landlord is postponed to the benefit of trade. *Brown v. Arundell* decides, that the title of the party who acts as auctioneer will not be inquired into. That case rests upon the plainest and simplest principle, and is not in any way distinguishable from the present. Here the goods are deposited in the yard for the purpose of being sold by public auction. The defendants, being well aware of that fact, seize them for rent. They are clearly responsible to the plaintiff.

PLATT, B.—Although the goods were in a yard, and not in a public auction room, that fact makes no difference. If a horse is sent to be sold, and is kept in a yard, it is equally privileged from distress. *Brown v. Arundell* in principle governs the present case. The facts there were even more in the defendants' favour than they are here.

MARTIN, B., concurred.

Rule discharged.

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PAULING and Another *v.* THE LONDON AND NORTH WESTERN
RAILWAY COMPANY. *May 30.*

ASSUMPSIT.—The first count of the declaration stated, that the plaintiffs, at the request of the defendants, agreed to sell to the defendants, and the defendants agreed to purchase from the plaintiffs, 6000 Heckmatack sleepers, at 3s. 1½d. each, which were to be delivered by the plaintiffs for the defendants at the Ellesmere or Egerton yard, in Liverpool, and were to be paid for by the defendants to Messrs. Houghton & Smith in cash, on delivery; (mutual promises); and, although the defendants did afterwards sell and deliver the said 6000 Heckmatack sleepers according to the terms of the said agreement, and the defendants then took and accepted the same, and although Messrs. Houghton & Smith were ready and willing to have accepted payment of the same according to the price aforesaid, amounting to 937l. 10s., yet the defendants have not paid Messrs. Houghton & Smith or the plaintiffs.—There was also a count for goods bargained and sold, and for goods sold and delivered.

The agent of an incorporated Railway Company agreed by parol with the plaintiff to purchase of him a quantity of railway sleepers upon certain terms. The sleepers were received and used by the company:—*Held*, that there was evidence from which the jury might find a contract by the company, the 97th section of the 8 & 9 Vict. c. 16, having provided that the directors may contract by parol on behalf of the company, where private persons may make a valid parol contract.

Pleas—first, non assumpsit; secondly, to the second count, a set-off: to which the plaintiffs replied “not indebted.”

At the trial, before *Martin*, B., at the last Liverpool Assizes, the following facts appeared.—On the 18th of February, 1852, the plaintiff Pauling wrote to one Eborall, a clerk of the engineer of the London and North Western Railway Company, the following letter:—

“Dear Sir,—I will undertake to deliver to you in the yard at Liverpool, 7000 Heckmatack sleepers, 9 feet long, 10 inches by 5, for 3s. 1½d. each, paying all portorage and cartage, &c.; the sleepers to be taken as they are in

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the stack, with the exception, that all undersized sleepers to be rejected by you. Should this offer be accepted, I shall be glad to give you an order on my agents in Liverpool, Messrs. Houghton & Smith, for their immediate delivery, they having charge of them for me. The invoice will have to be made out in their name.

"Your's truly,

"GEORGE C. PAULING."

On the 20th of February, Eborall sent the following reply:—

"Dear Sir—On consideration of your offer of the 18th instant of 7000 Heckmatack sleepers, I have no objection to accept it on account of the London and North Western Railway Company, for 6000 of them, provided they be delivered to our inspector or agent in the Ellesmere or Egerton yard, Liverpool, free from shakes and other imperfections, to size, and approved of by him and selves, at 3s. 1½d. each; and if agreeable, on receipt of your order upon Messrs. Houghton & Smith, we will commence shipping them.

"Your's truly,

"WILLIAM HENRY EBORALL."

On the 21st of February, the plaintiffs sent to Eborall the following answer:—

"Sir—I accept your offer of 6000 Heckmatack sleepers, delivered at the Ellesmere or Egerton yard in Liverpool, at 3s. 1½d. each, to be paid Messrs. Houghton & Smith in cash, on delivery. The sale being to you on account of the London and North Western Railway Company. I inclose an order on Messrs. Houghton & Smith, Liverpool, to deliver the sleepers.

"I am, Sir, your obedient servant,

"ROBERT FRY,

"Pro PAULING & Co."

A carrier, employed by the London and North Western Railway Company, went with this order to Messrs. Houghton & Smith's, and removed the sleepers to the station of the company, who afterwards used them on their line.

The plaintiffs sent the following invoice with the goods:—

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“Liverpool, 27th February, 1852.

“London and North Western Railway Company.

“Bought of Pauling & Co.

“Per Houghton, Smith & Co.

“6000 Railway Sleepers, $9 \times 10 \times 5$, @ $3/1\frac{1}{4}$. 937*l*. 10*s*.”

On the 13th of May, one of the plaintiffs received the following letter:—

“London and North Western Railway Company.

“Audit Office, Euston Station, May 13th, 1852.

“Sir—Having a payment to make on account of Pauling & Co. for sleepers purchased from Messrs. Houghton & Smith, Liverpool, amounting to 937*l*. 10*s*., as below stated, I have to request you to say whether you prefer the balance being sent to you direct, or to the parties above, and oblige

“Your's truly,

“W. KENDRICK.”

“Per J. GOALEN.

“C. PAULING & Co.

“(W. KENDRICK).”

“Cr.—Amount of account for sleepers . 937 10 0

“Less the sum due the London and North

Western Railway Company for hire of

engine whilst making the Clifton Branch 231 10 0

“Balance £706 0 0.”

Pauling & Co. afterwards requested the Company to pay the price of the sleepers to Messrs. Houghton & Smith, according to the agreement; but the Company refused to

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do so, on the ground that Pauling & Co. were indebted to them in the above amount of 231*l.* 3*s.*, which they sought to deduct. Some correspondence took place on the subject, in the course of which Pauling & Co. received the following letter from the secretary of the Company:—

“ Gentlemen,

“ Liverpool, 14th June, 1852.

“ Your favour of the 8th, addressed to the directors, has been forwarded to me here. The delay which has taken place in complying with your direction to pay to Messrs. Houghton, Smith, & Co. the amount due to you for sleepers, arises from our solicitors having informed me that several claims had recently been made on this company in reference to the Clifton Branch contract, for which you were the responsible party. I will endeavour that no further delay shall take place than what may be required for the adjustment of the several matters referred to.

“ I remain, Gentlemen,

“ Your obedient Servant,

“ H. BOOTH.”

It was objected, on behalf of the defendants, that there was no contract obligatory on them within the 97th section of the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16. The learned Judge ruled, that there was evidence for the jury of a contract with the company; and having left the question to them, a verdict was found for the plaintiffs for 937*l.* 10*s.*, leave being reserved for the defendants to move to enter a verdict for them on the first count; it being agreed that, in case the verdict was so entered, it should stand for the plaintiffs on the second count, with 706*l.* damages.

Milward, in the following Term, obtained a rule nisi accordingly, or for a new trial; against which,

Hugh Hill and *Cowling* shewed cause (May 26).—The plaintiffs are entitled to retain the verdict upon the first

count. There was ample evidence to support it. If the question had been one between private individuals, the defendants would clearly be liable. The goods were ordered on behalf of the company, and were delivered to them through their carrier; and, upon application to the directors for payment, no question was raised either as to the amount due, or the liability of the company; but they merely sought to postpone the payment, with a view to settle a cross demand. Moreover, the contract is executed, and not executory only. If any doubt could exist whether there was a contract obligatory on the company, it is entirely removed by the 97th section of the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16 (a). That

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(a) That section enacts, that "The power which may be granted to any such committee to make contracts, as well as the power of the directors to make contracts on behalf of the company, may lawfully be exercised as follows (that is to say):—

"With respect to any contract which, if made between private persons, would be by law required to be in writing and under seal, such committee or the directors may make such contract on behalf of the company in writing, and under the common seal of the company, and in the same manner may vary or discharge the same:

"With respect to any contract which, if made between private persons, would be by law required to be in writing, and signed by the parties to be charged therewith, then such committee or the directors may make such contract on behalf of the company in writing, signed by such

committee or any two of them, or any two of the directors, and in the same manner may vary or discharge the same:

"With respect to any contract which, if made between private persons, would by law be valid although made by parol only and not reduced into writing, such committee or the directors may make such contract on behalf of the company by parol only, without writing, and in the same manner may vary or discharge the same:

"And all contracts made according to the provisions herein contained shall be effectual in law, and shall be binding upon the company and their successors, and all other parties thereto, their heirs, executors, or administrators, as the case may be; and on any default in the execution of any such contract, either by the company or any other party thereto, such actions or suits may be brought, either

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section provides for three distinct classes of contracts, viz. those under seal, by writing, and by parol. It enacts that, where a parol contract would be binding between private persons, it will bind the company, if made by their directors. This is a contract of that description. There is no necessity for its being either under the seal of the company or in writing. The defendants are carriers for hire, and materials of the description in question are necessary for the purpose of carrying on their trade. They are matters of a trivial nature, and the necessity for them is of every day's occurrence. If the order had been for a few cwt. of sleepers, and the company had accepted them, and the directors had agreed to pay the price, the company would be liable, although the corporate seal of the company had not been affixed to the contract; and, indeed, the necessity for such a ceremony would destroy the company's powers to carry on their trade. If the seal were required to such a contract, it would be equally essential to the validity of an order for a barrow load of sand. The case in truth falls within the exception to the ancient rule, that a corporation cannot bind itself except by deed, and which was fully expounded by this Court in the *Mayor of Ludlow v. Charlton* (a), where it is said "a corporation which has a head, may give a personal command, and do small acts, as it may retain a servant. It may authorise another to drive away cattle damage feasant, or make a distress, or the like. These are all matters so constantly recurring, or of so small importance, or so little admitting of delay, that, to require in every such case the previous affixing of the seal, would be greatly to obstruct the every day ordinary convenience of the body corporate, without any adequate object." Lord Denman, C. J., in *Sanders v.*

by or against the company, as private persons only."
 might be brought had the same (a) 6 M. & W. 821.
 contracts been made between

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St. Neot's Union (a), upon the same principle, says, "A motion in this case was made for a new trial, on the ground that no contract under seal was proved against the defendants. But we think that they could not be permitted to take the objection, inasmuch as the work in question, after it was done and completed, was adopted by them for purposes connected with the corporation." In *Diggle v. London and Blackwall Railway Company* (b), the contract which this Court held to require the solemnity of the corporate seal, was for work of great magnitude, of unusual occurrence, and connected with the real property of the Company. In *Finlay v. Bristol and Exeter Railway Company* (c), Parke, B., expressed an opinion that the defendants, an incorporated company, were liable, in an action of use and occupation, for the enjoyment of land which they had actually occupied, in the absence of any contract under seal: and, in *Lowe v. London and North Western Railway Company* (d), the Court of Queen's Bench concurred in that expression of opinion, and decided the same point in the plaintiff's favour. The present case is even stronger than that cited; for here there is an express contract, whilst in that there was an implied contract only. *De Grave v. Mayor and Corporation of Monmouth* (e) may be referred to as an authority, that a corporation may contract by parol for the purchase of goods. It is therefore clear from the authorities, that this parol contract, having been executed, is good in law; and that there was ample evidence for the jury to warrant them in finding the company liable, although the contract was made by their agent: *Smith v. Birmingham Gas Company* (f).

Milward in support of the rule.—The first count has been treated as a common count for goods sold and deli-

(a) 8 Q. B. 810.

(d) 21 L. J., Q. B., 361.

(b) 5 Exch. 442.

(e) 4 Car. & P. 111.

(c) 7 Exch. 409.

(f) 1 A. & E. 526.

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vered. It appears, however, to have been expressly framed with the view of excluding a plea of set-off. There was no evidence to warrant the jury in finding a verdict for the plaintiffs on that count. The correspondence relied on as amounting to a contract, was not with the secretary of the company, but with a clerk of their engineer. It makes a material difference, whether a correspondence is carried on with the secretary, or other officer of the company, whose duty it would be to communicate the subject-matter to the directors, or whether it takes place with a mere servant, and in such a way that it would not, in the ordinary course of business, come to the directors' knowledge. [*Martin*, B.—If a clerk agrees to purchase goods upon certain terms, and his principal afterwards accepts the goods, he must take them upon those terms. Here the company have used the sleepers; then, according to the case of *Lowe v. London and North Western Railway Company* (a), a contract may be presumed.] These corporations cannot contract by conduct, but only under seal, or in the statutory mode. By the 96th section of the 8 & 9 Vict. c. 16, the directors cannot exercise the powers entrusted to them except at a legally constituted board meeting. Suppose the company had refused to accept the goods, would they have been liable for a breach of contract? A claim in respect of the use and occupation of land stands on an entirely different footing, because there the fact of occupation raises the presumption of a tenancy. An authority to contract by parol will not be implied, unless where the act is one without which the corporation could not subsist, as in the case of bills of exchange drawn by a trading corporation: *Mayor of Ludlow v. Charlton* (b). [*Alderson*, B.—Here there is an *executed* contract, and the only question is, upon what terms? Then, if the agent agreed to certain terms, and the com-

(a) 21 L. J., Q. B., 361.

(b) 6 M. & W. 815.

pany afterwards accepted the goods, that is evidence for the jury that they accepted them on those terms.] *Paine v. The Strand Union* (a), *Diggle v. London and Blackwall Railway Company* (b), *Lamprell v. Billericay Union* (c), and *Homersham v. Wolverhampton Waterworks Company* (d), are cases in which the work was done and accepted by the company; but they were nevertheless held not liable, there being no contract under seal, or as authorised by statute. *Homersham v. Wolverhampton Waterworks Company* (d) was expressly decided upon the 97th section of the 8 & 9 Vict. c. 16. The authorities were reviewed in the case of *Finlay v. Bristol and Exeter Railway Company* (e), where the law which governs contracts of this description is fully explained. In *Lowe v. London and North Western Railway Company* (f), the defendants had occupied the land, so that the case was within the principle laid down in *Finlay v. Bristol and Exeter Railway Company* (g). *Clarke v. Guardians of the Cuckfield Union* (h) was decided on the ground that the subject-matter of the contract was essential to the very purpose for which the corporation was created.

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POLLOCK, C. B.—The rule must be discharged, and on this ground, that there was evidence to be submitted to the jury, and they have come to the conclusion that there was a contract with the company. It appears that some correspondence respecting the purchase of these goods took place between the plaintiff and a person in the service of the company. I pause not to inquire whether he was a servant in a particular department, or whether he was the secretary of the company; it is sufficient that he was in the actual service of the company, and acting on their behalf in that correspondence. I must reject the

(a) 8 Q. B. 326.

(b) 5 Exch. 442.

(c) 3 Exch. 283.

(d) 6 Exch. 137.

(e) 7 Exch. 409.

(f) 21 L. J., Q. B., 361.

(g) 7 Exch. 409.

(h) B. C. Ca. 81.

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distinction attempted to be taken between the clerk of an engineer of the company and a clerk of the company; the former is a clerk of the company, though in that particular department. The special count has been framed in accordance with the contract contained in the correspondence, and there is evidence that the goods were received and used by the company. The question then is, under what contract were they so received and used. There was no proof of any other than that contained in the correspondence; and the case of *Lowe v. The London and North Western Railway Company* furnishes abundant authority for the position that, under these circumstances, there was evidence to be submitted to the jury, from which they might infer a contract with the company. Mr. *Milward* has entered into an elaborate analysis of the cases, and has attempted to distinguish this from some others, in which a parol contract has been held valid. Certainly, if reference were made to the cases decided upon any subject within the last ten years, and if, instead of taking an enlarged view of the matter, certain expressions were selected from particular judgments, and propounded as the law of the land, great doubt and difficulty might be raised in many questions extremely plain. However, in this case there is nothing to prevent us from giving effect to the doctrine laid down by the Court of Queen's Bench in the case of *Lowe v. The London and North Western Railway Company*. I think that the direction of the learned Judge was perfectly right.

ALDERSON, B.—I am of the same opinion. According to the express provisions of the Companies Clauses Consolidation Act, railway companies may be bound by contracts made by the directors on their behalf, in the same way as private persons are bound, that is to say, where private persons must contract by deed, the directors may contract on behalf of the company under their common seal; where, in the case of private persons, the contract

must be in writing, and signed by the parties to be charged therewith, there must be an instrument in writing, signed by at least two of the committee or directors; and where private persons may make a valid contract by parol only, the company may be bound by a contract made in the same manner by the committee or directors. Here the goods were furnished under a contract made with an agent of the company upon certain terms, and that is reasonable evidence of an undertaking by the company to accept the goods on those terms.

PLATT, B.—In my opinion the case is perfectly clear. The correspondence which took place after the contract affords sufficient evidence that the company were the real parties to the contract. In the case of *Homersham v. The Wolverhampton Waterworks Company* (a), there was no evidence that the extra work was either ordered by the company, sanctioned by the company, or ratified or adopted by the company.

MARTIN, B.—I am of the same opinion. When the matter is attentively considered, it is perfectly clear. Indeed, the plaintiff would have been entitled to a new trial, if I had not left the case to the jury. The declaration contained two counts; but the only question is, whether there was evidence to go to the jury in support of the first count. Now there are two ways of looking at the case:—First, how would it have stood, in the event of these defendants being private individuals? If the clerk of an ordinary firm made a contract for the purchase of goods on certain terms, and the partners afterwards received these goods, could it be contended, that when they adopted the contract, they did not take it upon the terms on which the clerk made it? I think that in point of law they would, but at all events there would be evidence from which the jury

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might come to that conclusion. Then the next question is, does it make any difference that the defendants are an incorporated railway company? The 97th section of the Companies Clauses Consolidation Act says, that where private persons may make a valid contract by parol, the committee or directors may make such contract on behalf of the company by parol only; and the case of *Lowe v. The London and North Western Railway Company* distinctly decided, that in the event of the company deriving benefit from such a contract, that is evidence for the jury of their having made the contract. If that decision is wrong, it is for a Court of error to set it aside; but in reality it does not militate against the previous decisions. *Homersham v. The Wolverhampton Waterworks* was the case of a contract under seal for the execution of certain works, and all that the Court held was that, there being an express contract with reference to that transaction, they could not in the absence of any evidence assume an implied contract for other work. With respect to *Diggle v. The London and Blackwall Railway Company*, the circumstances of that case exclude any contract of this kind, for the evidence shewed that the parties never intended to deal as upon an implied contract. However, I found my judgment on the case of *Lowe v. The London and North Western Railway Company*, which establishes that, under circumstances like these, when the company has had the benefit of the bargain, it is a question for the jury to say, whether in point of fact they have made such a contract.

Rule discharged.

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In Re THE EARL OF HARRINGTON v. RAMSAY.

June 11, 13.

BRAMWELL had obtained a rule, calling on the judge of the county court of Middlesex to shew cause why a writ of prohibition should not issue, to prohibit him from further proceeding in the matter of a plaint in that court.

The affidavits stated that, on the trial before the judge of the county court holden at Brompton, it appeared that the plaint was issued by the plaintiff to recover possession under the 122nd section (a) of the 9 & 10 Vict. c. 95, of certain premises which had been let by him to the defendant, and of which the tenancy had expired. The jury found that the annual rent of the demised premises was under 50*l.* per annum, and that no fine had been paid, but that the annual value exceeded 50*l.* It was thereupon objected, on behalf of the defendant, that, as the annual value of the premises exceeded 50*l.*, under the 122nd section, the county court had no jurisdiction. The judge delayed giving the warrant for the possession of the premises, to afford the parties an opportunity of having the question submitted to one of the superior Courts for decision. The defendant subsequently entered an appeal in this

Under the 122nd section of the 9 & 10 Vict. c. 95, by which the landlord of any house, land, or other hereditament may, after the interest of the tenant has expired, enter a plaint in the county court to recover possession of the premises "where the value of the premises, or the rent payable in respect of such tenancy did not exceed the sum of 50*l.* by the year, and upon which no fine shall have been paid," the county court has jurisdiction if either the rent, no fine having been paid, or the annual value of the pre-

mises, did not exceed 50*l.*—Per *Pollock*, C. B., *Platt*, B., and *Martin*, B.; dubitante *Alderson*, B.

(a) That section enacts, "That when and so soon as the term and interest of the tenant of any house, land, or other corporeal hereditament, where the value of the premises or the rent payable in respect of such tenancy did not exceed the sum of 50*l.* by the year, and upon which no fine shall have been paid, shall have ended, or shall have been duly determined by a legal notice to quit, and such tenant, or,

if such tenant do not actually occupy the premises, or occupy only a part thereof, any person by whom the same or any part thereof shall be then actually occupied, shall neglect or refuse to quit and deliver up possession of the premises, or of such part thereof respectively, it shall be lawful for the landlord or his agent to enter a plaint in the county court to be holden under this Act," &c.

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Court against the decision of the judge, upon a point raised as to the agreement under which the premises had been let; and this appeal, at the time of the argument on shewing cause against the present rule, was standing in the special paper.

Wise shewed cause (June 11).—The defendant, by having appealed under the 13 & 14 Vict. c. 61, s. 14, has ousted himself of his right of disputing the jurisdiction of the county court by writ of prohibition. It is said, in *Bowry v. Wallington* (a), "If he who appeals pray the prohibition, there he shall not have it; for then suits shall be deferred in infinitum in the Ecclesiastical Courts." That reasoning holds good in the present case. The remedies are inconsistent with each other. The defendant ought to have applied for a writ of prohibition in the first instance. It is only in the case where the defect in jurisdiction is apparent upon the face of the proceedings, that the prohibition will lie after an appeal: *Ricketts v. Bodenhams* (b). Secondly, inasmuch as the annual rent was less than 50*l.*, and no fine had been paid, the county court has jurisdiction under the 122nd section of the 9 & 10 Vict. c. 95. The words of that section are, "where the value of the premises, or the rent payable in respect of such tenancy, did not exceed the sum of 50*l.* by the year, and upon which no fine shall have been paid." So that, according to the ordinary and grammatical meaning of the sentence, when it appears to the county court that *either* the one or the other of the alternative propositions exists, the county court has jurisdiction. According to the plaintiff's construction of the clause, the county court has not jurisdiction unless both the rent and the annual value are less than 50*l.* But in that case it becomes necessary to substitute "nor" for "or," or to turn "or" into "and."

(a) Poph. 159.

(b) 4 A. & E. 433.

It would, moreover, be necessary in all cases to go into the question of the value of the premises, which would frequently be a matter of much complexity, and would give rise to great inconvenience. The section was intended to apply to cases where the party in possession wrongfully holds over; but he still may dispute the title of the alleged owner by bringing trespass, notwithstanding the adverse decision of the county court under this section. If the word "or" is to be read as "and," the second alternative in the sentence, with respect to the rent, becomes superfluous.—He was then stopped by the Court.

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Bramwell (*F. J. Smith* with him) in support of the rule.—The legislature clearly intended to give the county court jurisdiction only in case neither the value nor the rent exceeded 50*l*. For if the plaintiff's argument be correct, the county court might have unlimited jurisdiction. If, for instance, land were let for building purposes for the annual rent of 25*l*, and a house of the value of 5000*l*. were built upon it, in that case the county court would have jurisdiction. *Crowley v. Vitty*(*a*) is directly in point. The rent did exceed 50*l*, and this Court held that the jurisdiction of the county court was gone. [*Pollock*, C. B.—There both the annual value and the rent exceeded 50*l*.] But *Parke*, B., says, "Therefore, the rent being above 50*l*, it is unnecessary to consider the point with reference to the value."—[*Wise* referred to *Fearon v. Norvall*(*b*), where *Patteson*, J., says, "If I were called upon for a decision, I should have no hesitation in holding that, if the rent is under 50*l*, and no fine has been paid, it does not matter how great the value of the premises may be."] That was the mere expression of an opinion upon a point which was conceded. If the value or the rent exceeds 50*l*, the county

(*a*) 7 Exch. 319.

(*b*) 5 Dowl. & L. 449.

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court has no jurisdiction. There might be cases in which the rent is merely nominal, and is no criterion of the value of the property.

POLLOCK, C. B.—I do not entertain any doubt upon the matter, and I am clearly of opinion that this rule ought to be discharged. Unless we can so read the 122nd section as to turn the word “or” into “and,” which Mr. *Bramwell* urges us to do, the county court has jurisdiction in this case. I am not disposed so to deal with an Act of Parliament, unless, by reading the Act according to its plain and grammatical meaning, such construction would lead to some obvious absurdity or inconvenience repugnant to the Act itself.

ALDERSON, B.—I am inclined to think that the clause ought to be read as if the word “either” preceded the words “the value,” &c.; and then the clause would run thus—that “where either the value of the premises or the rent” did not exceed 50*l.*, the county court has jurisdiction. But perhaps if the word “either” be left out, the clause would be in effect the same.

PLATT, B.—I think that the county court has jurisdiction given to it by this clause, where either the one or the other of the two alternatives exists. Here the rent was less than 50*l.*, and consequently the case falls within the predicament contemplated by that section.

MARTIN, B.—I am entirely of the same opinion. It may be, that if the case suggested in the course of the argument, of land let for building purposes at a small rental, had been brought to the attention of the legislature whilst the Act was being passed, they would have adopted different language; but I do not think that for this reason

we are justified in turning "or" into "and" to obviate any such supposed inconvenience.

Rule discharged, with costs.

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At a subsequent period of the same day, the Court intimated that the rule would be suspended for the purpose of considering whether the Court should hear the case re-argued.

The case was again spoken to on the last day of Term, the rule having been in the meanwhile suspended, in consequence of a doubt afterwards entertained by *Alderson*, B., as to the propriety of the previous decision. That learned Judge thought that the words "where the value of the premises or the rent payable in respect of such tenancy did not exceed the sum of 50*l.* by the year," might be treated as equivalent to "where neither the value of the premises nor the rent did exceed 50*l.*;" and if so, the county court jurisdiction would be barred in this case, as the value here exceeded 50*l.*; and that, by so construing the clause, further effect would be given to the obvious intention of the legislature to limit the county court jurisdiction to 50*l.* But the rest of the Court not agreeing with him in this construction, and still thinking it right to adhere to the grammatical sense of the words of the clause, the rule was, as before, discharged with costs (a).

(a) See the same case in the Queen's Bench, where the majority of the Court (dissentiente *Crompton*, J.) upheld this decision: 2 E. & B. .

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May 25.

EMMETT v. TOTTENHAM.

The holder of a bill of exchange indorsed in blank, being unwilling to sue in his own name upon it, requested one K., who had guaranteed the payment of it, to get some one to sue for him upon it: K. accordingly requested one E., the plaintiff, to sue upon the bill, to which he assented; K. therefore applied to the holder for a copy of the bill. The holder delivered the bill to K., who, after having taken a copy, returned it again immediately, upon the understanding that the plaintiff should have it whenever he required it. The bill was not handed to the plaintiff till after action brought:—*Held*, that the plaintiff had neither any interest in the bill nor any possession of it, and therefore that he could not maintain the action upon it.

THE declaration was on a bill of exchange drawn by one Coghlan upon and accepted by the defendant, and indorsed by Coghlan to the plaintiff.

The defendant pleaded (inter alia), secondly, that it was not indorsed to the plaintiff; and thirdly, that the plaintiff was not, at the commencement of the suit, the holder of the bill; upon which issues were joined.

At the trial before *Alderson*, B., at the last Kent Assizes, the following facts appeared: The bill, which was accepted by the defendant, was discounted for Coghlan by one Rickards, to whom it was indorsed in blank; Rickards afterwards indorsed the bill by delivery to a Mr. Walker, at the same time guaranteeing its due payment. Mr. Walker shortly afterwards died, and the bill was found by his son and executor, the Rev. Dr. Walker, among his father's papers. Dr. Walker wishing to obtain the amount of the bill, but being unwilling that his own name should appear in an action upon the bill, requested Rickards to take the proper steps for that purpose, by suing upon the bill in the name of some third party. Rickards applied to Emmett (the plaintiff) to bring the action, and he consented to sue upon the bill; and thereupon Rickards called upon Dr. Walker, and communicated the arrangement to him, and asked for a copy of the bill. Dr. Walker handed him the bill, which he copied, and then returned it to Dr. Walker, at the same time saying, that it would be safer in his hands until the plaintiff wanted it; to which Dr. Walker replied, that the plaintiff might have it whenever he required it. The bill was subsequently given by Dr. Walker to his agent, and by him after action brought to the plaintiff, and it was produced at the trial.

It was contended on the part of the defendant, that

upon this state of facts the plaintiff had no such title to the bill as would sustain the action. The learned Judge left the case to the jury, and a verdict was found for the plaintiff, leave being reserved to the defendant to move to set that verdict aside, and to enter a verdict for him upon the second and third issues.

A rule nisi having been obtained accordingly,

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M. Chambers and *Lush* shewed cause.—The plaintiff had such a title to the instrument as was sufficient to support the action; for he had an interest in the bill, and had the right of possession. The law does not require the actual manual possession of the bill, to constitute a party the holder. If an indorser were to place a bill in a plaintiff's cash-box, that would be a sufficient possession to support an action upon the bill. The defendant cannot set up a *jus tertii*. There was evidence that the plaintiff had constructive possession of the bill. [*Martin, B.*—I remember a case of *Gill v. Lord Chesterfield* (a), in which I was counsel. It was an action upon a cheque for 500*l.* It appeared that the plaintiff had consented to lend his name for the purpose of suing upon the cheque, but he never had possession of it, nor had he otherwise interfered. *Rolfe, B.*, before whom the cause was tried, held that the action was not maintainable, and this Court supported that ruling.] The plaintiff there appears to have had no interest in the instrument upon which he sued. Here the plaintiff had an interest, and he was constructively the holder. In *Story on Bills*, s. 203, it is laid down, that "where a bill is originally payable to bearer, and therefore transferable by delivery only, actual or constructive delivery thereof would seem to be indispensable to complete the legal title thereto. But where the transfer is by indorsement, there an actual or constructive delivery seems now to be deemed indispensable to complete the title; and cer-

(a) Not reported.

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tainly must be so, if the transaction is not treated as consummated between the parties." *Lysaght v. Bryant* (a) is a strong case of constructive delivery. There, a firm consisting of two partners, being indebted to C., one of the partners (who acted as C.'s agent) with the concurrence of the other partner indorsed a bill of exchange in the name of the firm, and placed it among the securities which he held for C., but no communication of the fact was made to C. It was held that the jury were justified in finding that the bill was indorsed by the firm to C. In *Sainsbury v. Parkinson* (b), which was cited upon the motion for the rule nisi in this case, the plaintiff merely permitted the use of his name in the action; but he had no interest in the bill, and it was never indorsed to him. The plea, therefore, that the plaintiff was not the holder, and which form of pleading appears to have arisen from the decision in *Mars-ton v. Allen* (c) was answered. [Platt, B.—It seems to me that the transaction between these parties merely amounted to an agreement that the plaintiff should become the holder of the bill; but he never did become the holder. Pollock, C.B.—Unless there was evidence that he became the holder, either actually or constructively, the verdict cannot stand.]

Bovill (*Bramwell* with him) in support of the rule.—The cases of *Gill v. Lord Chesterfield* and *Sainsbury v. Parkinson* are expressly in point. Dr. Walker never ceased to be the true holder of the bill, for it never was transferred to the plaintiff. The bill was parted with for the sole purpose of allowing a copy of it to be taken. The plaintiff, therefore, never was possessed of the bill as the holder.

POLLOCK, C. B.—We do not entertain much doubt as to the result of this rule. We are, perhaps, going a step further than we did in the cases just cited, and we shall,

(a) 9 C. B. 46. (b) Exch., H. T., 1852. (c) 8 M. & W. 494.

therefore, take a short time to consider our judgment; and, in the event of our decision being adverse to the plaintiff, it may become a question whether he ought not to be permitted to raise the point for a Court of error by bill of exceptions.

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Cur. adv. vult.

POLLOCK, C. B., now said—In this case we are of opinion that the rule should be made absolute, to enter a verdict for the defendant upon the second and third issues, with liberty to the plaintiff to give up the verdict upon the other issues and to be nonsuited, if he desires the rule to be so moulded. Whether such a course will be of any service to the plaintiff, he will be advised; we do not hold out any expectation that it will:

The ground upon which we have come to our decision is, that the case falls within the simple proposition of law, that a person who has no interest in or possession of a bill of exchange, cannot maintain an action upon the instrument. The pleas, therefore, that the bill was not indorsed to the plaintiff, and that he was not the holder of it, were established by the facts which appeared on the trial. In order to support the general proposition upon which this case turns, it will be only necessary to refer to the cases of *Gill v. Lord Chesterfield* and *Sainsbury v. Parkinson*.

It was, however, argued in this case on the part of the plaintiff, that, although he had not the actual possession of the bill, still he had the constructive possession, or the possession by his agent. But we are of opinion that neither Rickards nor Dr. Walker was the plaintiff's agent, the evidence being that the plaintiff, in truth, was their agent. There is no reason why we should refine and draw nice distinctions to give effect to a transaction, because, for some reason or other, it was determined to

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keep some matters out of the view of the jury, by keeping some person in the background who was not desirous of forthcoming. There was no evidence that the plaintiff had either the possession of or any interest whatever in the bill. We are, therefore, of opinion that he was not entitled to sue upon it. The rule will be absolute, subject to the alternative mentioned, if the plaintiff should think that it will be of any benefit to him.

Rule absolute.

The plaintiff's counsel then applied for leave to tender a bill of exceptions. But the Court said, that they had considered the point, and as they were of opinion that the plaintiff had no chance of success, they would not put the opposite party to the risk of incurring any further expense by allowing such a course, more especially as the plaintiff had still the opportunity of raising the question by bringing a fresh action.

Rule absolute accordingly.

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June 2.

THE declaration was upon a deed made between J. Perry of the first part, W. K. Broadhurst of the second part, the plaintiff of the third part, and the defendant of the fourth part, which, after reciting that J. Perry and W. K. Broadhurst were then carrying on business in co-partnership together as manufacturers of earthenware, and that they had agreed with the plaintiff that he should become a copartner in the firm upon the terms contained in the deed, and after reciting that part of the terms of the agreement upon which the plaintiff had consented to become a partner were, that the defendant, the father of W. K. Broadhurst, should covenant with the plaintiff that the debts owing to the late firm of Perry & Broadhurst, included in a certain valuation, would realise so much money to the said J. Perry and W. K. Broadhurst and the plaintiff, and that the debts owing by the firm would not exceed the amount charged to the account thereof in the said valuation; and that the defendant would pay the deficiency in the former case, and the excess in the latter; the defendant did thereby covenant with the plaintiff, that the debts owing to J. Perry and W. K. Broadhurst would realise to them and the plaintiff in the whole the sum of 99*l.* 19*s.* 3*¼d.*, being the amount in the said valuation; and that, if the same did not realise that sum, the defendant would, on demand of the plaintiff, pay the deficiency thereof to J. Perry, W. K. Broadhurst, and the plain-

The plaintiff entered into an arrangement with A. and B., who carried on business in co-partnership together, to join the firm upon their obtaining for him some security as to the state of the firm. Accordingly, by a deed of co-partnership, the defendant, who was the father of one of the partners in the old firm, covenanted with the plaintiff that the debts then owing to A. and B. would realise to A., B., and the plaintiff in the whole 99*l.* 19*s.*, being the amount at which the same were valued; and that if the same should not realise the said sum, the defendant would, on demand of the plaintiff, pay the deficiency thereof to A., B., and the plaintiff; and also that the debts then owing by A. and B. did not exceed 1195*l.* 12*s.*, at which sum they had been valued; and that if they should exceed that sum, the defendant would, on demand of the plaintiff, out of his own private funds, pay to A., B., and the plaintiff, or the person to whom the same might be due, the sum which the last-mentioned debts might exceed the last-mentioned sum. At the time of the execution of the deed the firm was in insolvent circumstances, and shortly afterwards A. and B. were declared bankrupt. It appeared that the debts of the firm exceeded the valued amount of 1195*l.* 12*s.* by 1000*l.*; but it also appeared that less than the sum of 1195*l.* 12*s.* had been paid on account of the liabilities of the old firm:—*Held*, that the defendant's covenant was a contract of indemnity only, but that the plaintiff was entitled to recover as damages the actual loss which he had sustained by reason of the defendant's breach of covenant; and that the amount of such damage was purely a question for the jury.

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tiff; and also that the debts owing by the said J. Perry and W. K. Broadhurst did not exceed the sum of 1195*l.* 12*s.* 2*d.*; and that, if they did, the defendant would, on demand of the plaintiff, out of his own private funds, pay to J. Perry, W. K. Broadhurst, and the plaintiff, or the person or persons to whom the same might be due, the sum which the debts last aforesaid might exceed the said last-mentioned sum. The declaration then contained a general allegation of performance by the plaintiff of his part of the covenant, and that a reasonable time had elapsed for collecting and ascertaining the debts, and laid as a second breach, that the debts owing by J. Perry and W. K. Broadhurst did exceed the sum of 1195*l.* 12*s.* 2*d.* to a large amount, to wit, to &c., and that the same was demanded of the defendant by the plaintiff, yet that the defendant had not paid to J. Perry, W. K. Broadhurst, and the plaintiff, or the person or persons to whom the same were due, or any or either of them, the said sum which the said debts last aforesaid so exceeded the said sum of 1195*l.* 12*s.* 2*d.*, to wit, the sum of &c., or any part thereof.

The defendant pleaded to this breach, thirdly, that the debts owing by the said J. Perry and W. K. Broadhurst did not exceed the sum of 1195*l.* 12*s.* 2*d.*; and fourthly, that a reasonable time for collecting and ascertaining the debts due and owing by J. Perry and W. K. Broadhurst had not elapsed &c. Upon these pleas issues were joined.

At the trial, before *Williams, J.*, at the last Staffordshire Assizes, the facts appeared to be as follows: In the month of January, 1852, J. Perry and W. K. Broadhurst, who carried on business in copartnership together, advertised for a partner. The plaintiff consented to become a partner in the firm, on the condition of receiving some security that the property of the firm was of a certain value. Accordingly the defendant, who was the father of J. W. Broadhurst, agreed to enter into a covenant to give the security required. By the terms of the deed, made the 6th of March,

1852, between J. Perry of the first part, W. K. Broadhurst of the second, the plaintiff of the third, and the defendant of the fourth, the articles of partnership were provided for; and it contained the following clause: After reciting "that it was part of the terms of the agreement upon which the said E. Walker agreed to become a copartner with the said J. Perry and W. K. Broadhurst in the business aforesaid, that the said J. Broadhurst, the father of the said W. K. Broadhurst, should covenant with the said E. Walker, that the debts owing to the said late firm of Perry & Broadhurst, included in the valuation made of the effects thereof, on the admission of the said E. Walker into the partnership aforesaid, and accounted at their full value, would realise so much money to the said J. Perry, W. K. Broadhurst, and E. Walker, and that the debts owing by the said firm of Perry & Broadhurst would not exceed the amount charged to the account thereof in the said valuation; and that he would pay the deficiency in the former case, and the excess in the latter;" the deed then proceeded: "Now therefore the said Job Broadhurst doth hereby, for himself, his heirs, executors, and administrators, covenant with the said E. Walker, his executors and administrators, that the debts now owing to the said J. Perry and W. K. Broadhurst will realise to the said J. Perry, W. K. Broadhurst, and E. Walker, in the whole 99*l*. 19*s*. 3*¼d*., being the amount or sum at which the same had been valued on the admission of the said E. Walker into the said copartnership concern as aforesaid; and that if the same do not realise the said sum, he the said Job Broadhurst, and his heirs, executors, and administrators, shall and will, on the demand of the said E. Walker, his executors or administrators, pay the deficiency thereof to the said J. Perry, W. K. Broadhurst, and E. Walker; and also that the debts owing by the said J. Perry and W. K. Broadhurst do not exceed the sum of 119*l*. 12*s*. 2*d*., at which sum they have been taken

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on the occasion aforesaid; and that if they shall exceed the said sum, he the said Job Broadhurst, and his heirs, executors, and administrators, shall and will, on the demand of the said E. Walker, his executors or administrators, out of his or their own private funds, pay to the said J. Perry, W. K. Broadhurst, and E. Walker, or the person or persons to whom the same may be due, the sum which the said debts last aforesaid may exceed the said sum last aforesaid." Shortly after the plaintiff had become a partner, Messrs. Perry & Broadhurst were declared bankrupt, the old firm having been insolvent at the time the deed was executed; and it appeared that the debts due by the old firm at that time exceeded the sum of 1195*l*. 12*s*. 2*d*., (the scheduled amount) by 1000*l*.

It was contended on the part of the plaintiff, that he was entitled to the full amount of the excess, as the defendant's covenant was in effect for a liquidated sum. The learned Judge, however, was of opinion that the covenant was one of indemnity only, and that it was a question for the jury as to the amount of actual damage which the plaintiff had sustained by reason of the defendant's breach of his covenant. Evidence was then given to shew to what extent the plaintiff had received pecuniary loss; and he also stated that he would have made 150*l*. per annum as a farmer if he had not entered the firm. It did not, however, appear that more than 950*l*. had been paid on account of the debts of the old firm. On the part of the defendant, it was contended that the covenant was a contract to indemnify the plaintiff in the event of the funds of the partnership into which he entered being drawn upon to a greater extent than to the amount of the scheduled debts, and consequently that the plaintiff was entitled to nominal damages only. The learned Judge, in directing the jury, told them that they were to take all the circumstances into their consideration; and that, although what the plaintiff had lost by

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the concern was not the true criterion, still they were to consider what the plaintiff had lost by reason of the debts of the firm having been untruly stated; that although the firm might or might not have been prosperous, still the jury were to say to what extent the plaintiff's position had been altered by reason of the defendant's breach of covenant. A verdict was found for the plaintiff, with 500*l.* damages; leave being reserved to the plaintiff to move to increase the amount to 1000*l.*, and to the defendant also to reduce the amount to a nominal sum.

Whateley, on the part of the plaintiff, obtained a rule nisi in pursuance of the leave reserved.—He cited *Lethbridge v. Mytton* (a), *Carr v. Roberts* (b), *Loosemore v. Radford* (c), *Warwick v. Richardson* (d), and *Ex parte Broadhurst In re Broadhurst* (e). And *Keating*, for the defendant, obtained a rule nisi, either to reduce the damages, or for a new trial on the ground of misdirection.

Keating (*Whitmore* with him) shewed cause against the plaintiff's rule.—The question on this part of the rule turns upon the construction of the deed; and the dispute is, whether the covenant by the defendant is an absolute one to pay the amount of the excess above the sum stated in the schedule of the debts due by the old firm; or whether it is a mere covenant of indemnity, as it appeared to be to the learned Judge at the trial. That excess amounted to the sum of 1000*l.* The defendant contends that the covenant is one of indemnity. This point was before the Lords Justices, when the question arose whether the breach of this covenant would form the ground of a good petitioning creditor's debt to support an adjudi-

(a) 2 B. & Ad. 772.
 (b) 5 B. & Ad. 78.
 (c) 9 M. & W. 657.

(d) 10 M. & W. 284.
 (e) 22 L. J., Bank., 21.

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cation in bankruptcy. The Lords Justices, who called in aid the assistance of *Maule*, J., adopting the view of that learned Judge, held, that the covenant was not a covenant to pay a stated or liquidated sum, but that the remedy lay in damages, and consequently that it did not constitute a good petitioning creditor's debt. *Maule*, J., there said (a), "It is clear, from the recitals in the deed of partnership which contains the covenant in question, that the engagement entered into was one entered into for the benefit of Mr. Walker. The covenant was with Mr. Walker for the benefit of Mr. Walker, and was not a covenant with Mr. Walker for the benefit and on behalf of Walker, Perry, and Broadhurst. They had in fact no interest in it; but Mr. Walker was alone interested. It was a covenant to pay the difference between the debts due from the old firm, stated in the schedule, and any further debts; it was to pay the excess of one set of debts over the other set of debts—over the amount of debts due to the firm. That being so, it seems to me impossible to turn the covenant into a covenant to pay a liquidated sum, or any sum, to Walker. The covenant could not be performed by doing that: the object of the parties was to put the firm in the same position in which they would be if the debts, active and passive, were to the amount stated in the covenant; and there is no specific sum engaged to be paid to Walker. It cannot be treated at law as a specific sum of money to be received, for the right to receive would be co-extensive only with the damage sustained; and this cannot be so made the subject of computation as to be a fit ground for a petitioning creditor's debt: no action could be founded upon it. I do not mean to say that a covenant to pay to A. for the benefit of A., B., and C., may not be made a good petitioning creditor's debt. In the present case there might not be a sufficient damage to constitute the debt.

(a) 22 L. J., Bank., 21.

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or even suppose that damage to the amount of 100*l.* was shewn, still it does not follow that the money could have been recovered, as any thing to be recovered must be in the shape of damage, and such damage is not of a character to amount to a petitioning creditor's debt." The defendant relies upon that opinion, as indicating the correct view of the construction of this deed. The cases cited on the part of the plaintiff on the motion for the rule nisi are distinguishable from the present. In *Lethbridge v. Mytton* (a), the defendant covenanted to pay a precise and fixed sum of 19,000*l.* within the year; and it was held that the trustees were entitled to recover the whole of it, although no special damage was proved. Here there is no sum fixed. In *Carr v. Roberts* (b) the defendant absolutely covenanted to pay the debt. There, the amount being ascertained, the intervention of a jury was unnecessary. In *Loosemore v. Radford* (c), the plaintiff and the defendant, being joint makers of a promissory note, the defendant as principal and the plaintiff as his surety, covenanted with the plaintiff to pay the amount to the payee of the note on a given day, but made default; and it was held, in an action on this covenant, that the plaintiff was entitled, though he had not paid the note, to recover the full amount of it by way of damages. There also the defendant was liable, and had promised to pay a fixed sum. The case of *Warwick v. Richardson* (d) involves the same principle. There the covenantor agreed with the covenantee to pay him a fixed sum, for which the covenantor himself was liable. The present case contains neither the one nor the other of these two ingredients. The defendant was not liable for the debt, and the amount of damage was altogether unliquidated, and could not be ascertained without the assistance of a jury.

(a) 2 B. & Ad. 772.

(b) 5 B. & Ad. 78.

(c) 9 M. & W. 657.

(d) 10 M. & W. 284.

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Whateley and *Motteram* were then heard in support of the plaintiff's rule.—It is submitted that this is an absolute covenant on the part of the defendant to pay the excess of the debts due by the firm beyond the scheduled amount. The defendant is therefore liable to pay the sum of 1000*l.*, which has been ascertained to be that excess, just as he would have been if that precise sum had been specified in the deed. The plaintiff entered into the partnership on the express understanding that that sum should be paid. The defendant must be taken to have known the true state of the partnership debts. He stipulated that the capital of the partnership should reach a certain amount. [*Pollock*, C. B.—Suppose a party were to enter into a covenant to the effect that he is worth 1000*l.*, and it turned out that he is not, the covenantee would not be entitled to recover the full sum of 1000*l.*, but only the actual loss he has sustained by reason of the covenantor's breach of covenant. We do not entertain any doubt that this is a mere contract of indemnity, and that the plaintiff can only recover the actual damage he has sustained by reason of the defendant's breach of his covenant.]—They were then stopped by the Court on the point raised by the defendant's rule.

Keating in support of the defendant's rule.—The plaintiff was only entitled to nominal damages, inasmuch as it did not appear that the result would have been different if the amount of the scheduled debts had been correctly stated. The amount paid for the debts from the funds of the firm did not equal the amount of the scheduled debts. The jury, moreover, ought to have had the specific payments brought to their attention; and as the plaintiff's loss was treated as matter of account, the supposed loss which the plaintiff sustained by reason of his having been deprived of the opportunity of carrying on his business as a farmer, ought not to have been submitted to the jury.

POLLOCK, C. B.—We are of opinion that both the rules must be discharged. The view which the learned Judge took of the construction of the deed is, in our judgment, the true one; and the way in which he presented the case to the jury was strictly correct. The amount of the damages was altogether uncertain, and does not turn upon any nice question of account either one way or the other; but the matter was purely one for the jury, and it was their proper province to assess the amount to which the plaintiff was entitled, just in the same way as if the plaintiff had brought an action for a personal injury occasioned to him by the defendant's default.

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ALDERSON, B.—The plaintiff entered into this concern upon the agreement that the partnership debts did not exceed a certain sum; and the action is brought for the breach of covenant arising from the damage the plaintiff has sustained by reason of the defendant's breach of covenant in not taking care to have the proper amount inserted in the schedule. The damages so incurred are altogether uncertain.

PLATT, B., and MARTIN, B., concurred.

Rules discharged.

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June 3.

CALDICOTT v. GRIFFITHS and LOWE.

By the rules of a society "for the protection of trade," the professed object of which was to watch the progress of measures through Parliament affecting the trade interests, and to protect its members from the practices of the fraudulent and dishonest, the committee had the appointment of the printer and stationer, to be elected from among the members of the society; and to the committee was to be referred the defraying of the expenses, and the applying and disposing of the monies of the society. And it was also provided by the rules, that the sum of 10*l*. should be left in the secretary's hands to meet the current expenses; but that all orders for the payment of money should be drawn by the secretary upon the treasurer at a committee meeting. The plaintiff was appointed printer and stationer to the society, and shortly afterwards paid his subscription. The defendants, who were members of the committee, passed the resolutions for the orders for printing and stationery which were supplied by the plaintiff:—*Held*, that the plaintiff was not precluded by the rules from suing the defendants, as the rules did not create a partnership between the members of the society; and that it was not to be inferred from the rules that the plaintiff looked to the fund, and not to the parties who gave the orders.

THIS was an action of debt for goods bargained and sold, for work and materials, for money paid, and on an account stated.

The defendants pleaded, separately, never indebted; upon which issue was joined.

At the trial, before *Williams, J.*, at the last Gloucester Assizes, it appeared that the action was brought to recover the balance of an account for printing and stationery, supplied by the plaintiff to the committee of a society at Wolverhampton, called "The Midland Counties Guardian Society for the Protection of Trade," of which committee the defendants were members. A preliminary meeting of the subscribers was held in August, 1850, for the purpose of organising the society, when the rules of the society were approved and adopted. By Rule 1, the objects of the society were stated to be, "to watch the progress of any measure in Parliament affecting the trade interests, and to protect its members from the practices of the fraudulent and dishonest." Rule 2 provided, that the affairs of the society should be managed by a president, vice-president, treasurer, secretary, and committee. By Rule 3, the officers were to be elected at each annual meeting by a show of hands; and the election of officers and members was to be determined by a show of hands; and no officer should be eligible who had not been a member for six months. Rule 4 required a committee of twenty-four members to be elected at the annual meeting. By Rule 6, it was provided, that the committee should have the appointment

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of the printer and stationer, who should be elected by them annually from among the members of the society, who should have the power of dismissing the printer and stationer, should they be dissatisfied with the way in which he conducted the business of the society; and that to such committee should be referred the defraying of expenses and the applying and disposing of the money belonging to the society. That all correspondence for the furtherance of the objects of the society should be carried on under their direction and control; and that they should transact all other special business, subject to such rules as were then or thereafter should be laid down by a general meeting of the society. By Rule 7, a sub-committee of five were to be appointed, under whose direction certain business was to be done. By Rule 9, it was provided, that the sum of 10*l.* should be left in the hands of the secretary to meet the current expenses; but that all orders for the payment of money were to be drawn by the secretary upon the treasurer at a committee-meeting, and were to be signed by the chairman, the secretary, and a member of the committee. Rule 12 provided, that the committee should have power, at any time previous to December 25th, 1850, to admit members, but that after that date a more formal mode of election should be observed (which was there pointed out). By Rule 13, the amount of annual subscription was fixed at 10*s.* 6*d.*, due the 1st of August, in advance. By the 17th Rule, provision was made for the appointment of a sub-committee of five members, who, in the absence of the secretary, were to give directions about the printing of circulars. Rule 19 provided, "that if any action shall be commenced against the secretary or solicitor or any member of the committee, for any act done by him or them in the due exercise of their duties as officers of the society, he shall be defended out of the funds of the society; and if such funds at any time prove insufficient, such deficiency shall be supplied by all the

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members in equal proportions." By Rule 24, a general statement of accounts and a report of the proceedings, with a list of the members, was to be published annually. At a subsequent meeting of the society, at which the defendants were present and acted on the committee, the plaintiff was appointed printer to the society for the ensuing year; and it was resolved, that the secretary be authorised to order the books and stationery necessary for working out the objects of the society. At the time of his election as printer, the plaintiff was not a member of the society, but he promised the secretary the payment of the subscription of 10s. 6d., and he paid that sum shortly afterwards. He never attended any of the meetings, or took any part in the proceedings. The orders for other portions of the stationery and work were given to the secretary at subsequent meetings, at which the defendants were present and acted upon the committee in passing the resolutions, and the secretary delivered such orders to the plaintiff. It appeared that the subscriptions had been paid away in the current expenses of the society.

Upon this state of facts, it was objected, on the part of each of the defendants, that they were not liable, inasmuch as it appeared that the plaintiff and they were members of a co-partnership, and that the plaintiff had looked to the funds of the society, and not to the personal responsibility of the defendants. The learned Judge was of that opinion; but he left the case to the jury, who found a verdict for the plaintiff for 199*l*. 6*s*. 5*d*. His Lordship, in pursuance of the opinion he entertained, directed a verdict to be entered for the defendants, with leave to the plaintiff to move to set it aside, and to enter the verdict for the amount found by the jury.

Keating having accordingly obtained a rule nisi,

Quain for the defendant *Lowe*, and *W. H. Cooke* for the defendant *Griffiths*, shewed cause (June 2).—There was

no evidence of the defendants' liability, upon two grounds: first, the plaintiff and defendants were members of the same partnership; and secondly, there was no evidence that the plaintiff looked to the personal responsibility of the defendants, as the rules lead to the conclusion that the plaintiff's claim was to be satisfied out of the funds of the society. That the plaintiff was a member, is clear from the 6th rule, which provides that the printer shall be appointed from among the members of the society. He paid his subscription. The object of this society was, that a number of persons should join together for a common purpose, and that they should contribute to a common fund. A partnership, or quasi partnership, was thereby created, and its members could not sue each other at law for such matters as had been undertaken for their common benefit. This is the principle of the decision in *Holmes v. Higgins*(a), where the plaintiff and the defendant, with a number of other individuals, had associated together and subscribed sums of money for the purpose of obtaining a bill in Parliament to make a railway. It was there held that they were so far partners, that one of the members could not sue another for work done for the undertaking. In *Milburn v. Codd*(b), the plaintiff and the defendant were members of the London Carriers Company, and the same principle was followed. These parties, therefore, being partners, cannot sue one another.

Secondly. The simple fact of the appointment of the plaintiff as the printer to the society, and the order for the work, does not make the defendants personally liable. The plaintiff ought to have given positive evidence that the defendants pledged their personal credit, and that the plaintiff looked to them alone for payment. In this respect, the case of *Wilson v. Lord Curzon*(c) is in the defendants' favour. There is no evidence that the plain-

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(a) 1 B. & C. 74. (b) 7 B. & C. 419. (c) 15 M. & W. 532.

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tiff looked to the committee. He was acquainted with the rules; and by the provisions which they contain the expenses of the undertaking were to be defrayed out of its funds. *Primâ facie*, therefore, the plaintiff looked to the funds for payment. [*Alderson*, B.—Where a pipe of wine is ordered by the committee of a club, the wine merchant may be said to expect to be paid out of the funds of the club; but still he looks to the committee for payment. And the case is the same although he be a member of the club.] It is submitted that these rules differ the case from the ordinary one of a club, as they provide that all the debts shall be paid out of the funds by an order upon the treasurer, to be authenticated in the manner there pointed out. *Higgins v. Hopkins*(a) is strongly in the defendants' favour. *Parke*, B., there said, "If a party merely speculates upon the chance of being paid, taking the risk whether funds will be collected and appropriated to his demand, there is no contract. If he does work on the order of another, under such circumstances that it must be presumed that he looks to be paid as a *matter of right* by him, then a contract would be implied with that person,—under most circumstances an absolute one; under some, a conditional one, provided he receives funds wherewith to pay." In *Landman v. Entwistle*(b), it was held, that where the party looks to the funds for payment, the existence of such funds must be shewn.

Keating and *Phipson* appeared in support of the rule; but the Court intimated that they would take time to consider whether it would be necessary to hear them.

Cur. adv. vult.

POLLOCK, C. B., now said—This was a motion to set aside a nonsuit, and to enter a verdict for the plaintiff for

(a) 3 Exch. 163.

(b) 7 Exch. 632.

the amount which the jury have found to be due to him. It will be unnecessary to hear any argument on behalf of the plaintiff, as we are all clearly of opinion that the rule must be absolute. The question submitted to us was, whether there was any evidence to go to the jury to support the plaintiff's claim; and we are all of opinion that there was. On referring to the society's rules, upon which the question turns, it appears to us, that the circumstance of the plaintiff being a subscriber or a member of the society does not in any way preclude him from maintaining an action against the members of the committee who personally ordered the work which was done for them. These rules do not constitute a partnership amongst the members or subscribers, and therefore they do not on that ground take away from the contributor his right of action against the members of the committee. The question is, whether, by entering into this scheme, the subscribers form a partnership or a quasi partnership; or whether the case is similar to that of a number of persons subscribing to a hospital or to an ordinary club. The solution of that question is not to be arrived at by examining cases which have reference to the liability of committee-men or shareholders in projected railway companies and in other undertakings of that description, but by consulting the rules themselves. And upon doing so, I am clearly of opinion that they do not preclude the plaintiff, as a mere subscriber, from maintaining an action against the committee-man giving the order for the goods, and which order would have made him personally liable to a third party. And, indeed, if a jury had found a verdict for the defendants, the plaintiff would have been entitled to a new trial. At least there was evidence to warrant the jury in their verdict.

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ALDERSON, B., concurred.

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PLATT, B.—I am of the same opinion. The rules do not give the committee any authority to pledge the credit of the subscribers. The person who gives the order is personally liable. If that person could not be sued, no one would be responsible for the debt.

MARTIN, B.—Two objections were made to the plaintiff's right of action. First, it was said that, inasmuch as the plaintiff was a copartner with the defendants, he was thereby incapacitated from suing them; and secondly, that there was no evidence to go to the jury, as the plaintiff did not look to the defendants personally, but to the funds of the society; and that the existence of such funds should have been shewn. Upon the first point several cases were cited; but the principle itself is extremely clear, that where payments are to be made out of a particular fund, to which two or more persons contribute as partners, one of them cannot sue his copartner. In the present case, however, a number of persons are associated together for the purpose of the protection of trade, each of them having to pay a small sum annually, and thereby becoming entitled to such information upon the subject as can be obtained in the mode pointed out. It is an abuse of language to call such an association a partnership. It is neither more nor less than a number of persons who choose to subscribe to a fund for the purpose of obtaining certain information useful to themselves in their business. The fact of the plaintiff having subscribed with the view to entitle him to the benefit of such information, does not constitute him a partner, so as to preclude him from suing another subscriber who gives the order. In the case of a club, it has been held, that a party who supplies goods to the committee cannot sue a mere subscriber, because by being a member a man does not make the committee his agents to pledge his credit (a).

(a) See *Fleming v. Hector*, 2 M. & W. 172; *Todd v. Emly*, 8 M. & W. 505.

The second question is, whether there was evidence of the bargain that the persons employing the printer were not to be personally liable, but that the contract was merely that they should make the payments. Looking at the rules of the society, I do not say that there was no evidence that the bargain was not that for which the defendants contended; but still I think that if the jury had so found by their verdict, I should not have felt satisfied with such a verdict. Mr. *Quain*, in his argument, referred to several cases concerning the liability of provisional committee-men of projected railway schemes. Whether some of those cases were rightly decided it is not necessary to determine, although I entertain a strong opinion upon the subject. But the present case is a very different one. The plaintiff here had nothing whatever to do in setting this scheme on foot, though the secretary promoted the scheme; but the plaintiff was merely connected with it by being appointed as the printer and stationer under the 6th rule, which gives the committee, of which both the defendants were members, the appointment of the printer and stationer, and the power to dismiss him. Under that rule the committee were also entrusted with the power of defraying the expenses and of applying and disposing of the money belonging to the society. It is a forced construction of that rule to say, that the man who did the work did it upon the terms that he was not to be paid except out of the funds of the association. In fact, it was never contemplated that the payment should depend upon any such contingency. The question was properly one for the jury; and the verdict found for the plaintiff was in my opinion right.

Rule absolute.

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June 13.

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In an action for the infringement of a patent, pleas which deny that the plaintiff was the true and first inventor, and that the manufacture was new, do not bind the plaintiff to the description of the invention as given in the specification, so as to preclude him from giving evidence to shew that the invention does not consist, as might be inferred from the specification, in the use of several new matters, but in the new combination of several old matters.

THE declaration stated, that the plaintiffs were the first and true inventors of a certain new manufacture of "certain improvements in valves or plugs for the passage of water or other fluids;" that thereupon letters patent were granted to them for the sole use of the said invention, subject to a condition that they should, within six calendar months next after the date of the said letters patent, cause to be inrolled in the High Court of Chancery an instrument in writing under their hands and seals particularly describing and ascertaining the nature of their said invention, and in what manner the same was to be and might be performed; that the plaintiffs did within the time prescribed fulfil the said condition; and that the defendant during the said term did infringe the said patent right.

The defendant pleaded, first, not guilty; secondly, that the plaintiffs were not the first and true inventors of the said supposed new manufacture, as in the declaration alleged; and thirdly, that the said alleged invention was not an invention of any manner of new manufacture. Upon these pleas issues were joined.

At the trial, before *Martin*, B., at the Middlesex Sittings after Hilary Term, the plaintiffs gave in evidence the specification. After setting forth the title of the invention, and the condition, as stated in the declaration, the specification proceeded as follows: "Our improvements in valves or plugs for the passage of water or other fluids apply principally to cocks or valves used for drawing off water from the main or service pipes of waterworks; for the supply of mills, works, or buildings; for the extinction of fire; for the watering of roads, streets, or gardens; for the irrigation of land; for the cleansing of water-pipes; for the flush-

ing of sewers; and for other similar purposes; and relate first to the use and application, for the purpose of drawing off water or other liquids, of a valve (of a globular or other form) of a specific gravity lighter than water, and constructed of or covered with vulcanized India-rubber, gutta percha, or other compressible elastic substance, the closing of such valve being effected by the pressure of the water. Secondly, to the use and application, for the same purposes, of a valve of a globular form, of the same or greater specific gravity than water, constructed or coated as above described, and closed in a similar manner. Thirdly, to opening valves for the passage of fluids by means of a moveable opening key, consisting of a hollow tube or pipe, with proper adjuncts, so applied, as without the aid of any thread or screw upon the barrel or any fixed part of the valve itself, or the parts necessarily permanently connected therewith, to force the valve open against the pressure of the fluid, the key or tube being so constructed that the fluid, when released, shall pass off through the said tube." The specification then contained an explanation of the drawings of the apparatus for carrying the invention into operation, and then proceeded to state the inventors' claim, as follows:—"Having now described the nature and object of our said improvements, we would remark that we claim as an invention, first, the application for the purpose of drawing or letting off water or other fluids of a valve of less specific gravity than water, constructed of or coated with vulcanized India rubber, gutta percha, or other suitable compressible elastic material, and which closes or is kept closed by the pressure of the water. Secondly, the application for similar purposes of a globular valve, of the same or greater specific gravity than water, and constructed or coated as above described, which without mechanical aid will close by the pressure of the water. Thirdly, the opening of valves by means of a key or tube, so applied as to force the valve open against the pressure of the water

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or other fluid, and through which key or tube the fluid escapes, such key or tube being attached to the box or barrel or other fixed part of the valve, without the aid of a thread or screw on such box or other fixed part."

The plaintiff Bateman was called as a witness, and he stated that his invention consisted in the combination of the three different matters described in the specification, and that he did not claim them separately.

On the part of the defendant, it was contended that the specification, which must be taken as the description of the patent, did not contain a claim for the combination, and that the plaintiffs were bound by that description. The learned Judge, however, left the case to the jury, who found that each of the three separate parts was old, but that the plaintiffs' invention was for the combination, and that it was useful; and the plaintiffs obtained a verdict.

In last Term, the *Attorney-General* obtained a rule nisi for a new trial, on the ground of misdirection.

Atherton and *Webster* shewed cause, (June 7 and 8).—First, the plaintiffs claim by their specification the combination of three distinct parts of one complete apparatus. The three different portions of this invention are old; but the jury have found the combination to be new and useful. The specification ought to be read in a fair spirit, and not for the mere purpose of raising technical objections to it: *Newton v. Grand Junction Railway Company* (a), per *Rolfe*, B. [The plaintiffs' counsel then proceeded to discuss the specification; and they insisted that the claim was that for which they contended. The argument was chiefly directed to the effect of the specification; and they also referred to *Hayworth v. Hardcastle* (b), and *Crossley v. Beverley* (c).]

Secondly. The plaintiffs' invention is not to be strictly

(a) 5 Exch. 336. (b) 1 Bing. N. C. 182 (c) 9 B. & C. 63.

confined to the description given of it in the specification; but it is to be gathered from that instrument, taken in conjunction with the plaintiffs' evidence: for the defendant has not placed any plea upon the record which confines the plaintiffs to the description of the invention given in the specification. [*Alderson, B.*—The difficulty which presses us is, that, although the plaintiffs may have invented a useful machine, they have not properly described it.] That objection is not open to the defendant upon this state of the record, for neither of the pleas, that the plaintiffs were not the true inventors, and that it was not a new manufacture, raises the question. The specification does not estop the plaintiffs from giving evidence of what their real invention was, and the jury have found it to be for the combination of the three parts of the machine, and that the defendant has infringed that invention.

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The *Attorney-General*, *Hindmarch*, and *Grove*, in support of the rule.—The defendant does not dispute the validity of the specification, but he contends that the plaintiffs cannot support the invention. [*Alderson, B.*—The question is, whether the objection is open to the defendant without a proper plea.] The point is raised by the pleas of want of novelty. The defendant denies the invention described in the specification to be new. If the invention was in fact for the combination of the three matters, the plaintiffs have not so described it. The specification clearly describes three separate things, which the plaintiffs claim as improvements (in the plural). It must be assumed that the invention, for the infringement of which the plaintiffs bring their action, is that which is mentioned in their declaration, and is described in their specification. The defendant could not have successfully pleaded that the plaintiffs had not duly described their invention. If these three matters were new instead of old, a patent claiming them would be unobjectionable. The Crown re-

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quires that the inventor shall specify his invention, which must be enrolled as a condition necessarily attached to the grant. And the patentee is estopped from saying that his invention is anything but that which his specification describes. [*Martin*, B.—How were the plaintiffs under the necessity of giving the specification in evidence?] They did so for the purpose of shewing the nature of their invention. In old times the subject matter of the patent was described by way of recital in the patent itself; but in the reign of Anne enrolment was substituted for the existing form. The specification, therefore, is a condition to and forms a part of the grant itself of the patent. In the older cases the patent and the specification used to be treated as forming integral portions of a whole. In *Hornblower v. Bolton* (a), *Grose*, J., says (b), that “the patent is nothing without the specification, and the patentee can gain no advantage by it.” *Crossley v. Beverley* (c) is also in the defendant’s favour. If the plaintiffs could depart from their specification, they might rest their claim upon any invention which they had never described. [*Alderson*, B.—The patent is granted upon the condition that the grantee shall afterwards particularly describe their invention in a specification to be duly enrolled. The plaintiffs were not bound to put in the specification, which was not in any way in issue.] The specification having been given in evidence, parol evidence was not admissible for the purpose of contradicting it. The construction of all written instruments belongs to the Court alone: *Neilson v. Harford* (d). [*Martin*, B.—The defendant did not object to the admissibility of the evidence.] The evidence was applicable to other purposes in the cause, but must be rejected in the consideration of the specification.—They also cited *Russell v. Ledsam* (e),

(a) 8 T. R. 95.

(b) Page 105.

(c) 9 B. & C. 62.

(d) 8 M. & W. 823.

(e) 1 C. M. & R. 864.

Hill v. Thompson (a), *Kay v. Marshall* (b), *Dobbs v. Penn* (c),
Newton v. Vaucher (d), *Muntz v. Foster* (e), *Gibson v. Brand* (f),
Bentley v. Goldthorp (g), and *Gamble v. Kurtz* (h).

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Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—In this case we think the rule must be discharged. The action was for the infringement of a patent for improvements in valves or plugs for the passage of water or other fluids. The pleas were, first, not guilty; secondly, that the plaintiffs were not the first and true inventors; and thirdly, that the invention was not a new manufacture.

It appeared at the trial, that, on the examination of one of the plaintiffs, he stated that his invention consisted of a combination of certain machinery, each portion of which was old, but (as the jury found) the combination itself was new; and it was admitted on all hands to be very useful. In the course of the trial, the specification, which had been in due course filed, was also put in evidence. It was on this contended that the claim in the specification was that, of the three parts of the machinery therein mentioned, each was new; and that the invention claimed was not (as the plaintiffs contended it was) the combination, which alone the jury found to be new. This point was argued before us, and we are disposed to think there is much weight in the objection to the validity of the specification on this point. But we do not think it necessary to decide this question, because it does not arise on the present pleadings. The only issues on the record are

- (a) 3 Meriv. 622.
- (b) 5 Bing. N. C. 492.
- (c) 3 Exch. 427.
- (d) 6 Exch. 859.

- (e) 6 M. & Gr. 734.
- (f) 4 M. & Gr. 205.
- (g) 1 C. B. 368.
- (h) 3 C. B. 425.

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the infringement (about which there is no doubt) and the novelty of the invention.

We think that what was the invention was a question for the jury, and that the production of the specification did not conclude it. It was evidence to be considered by the jury, but no more, that the plaintiff had so described his invention. But it may be, even if the defendant's construction be the true one, that the invention was new as a combination, and yet the description of it in the specification erroneous. Now here the jury have clearly found the invention to be that of a new combination of old parts. And if this be so, the real and true objection which was open to the defendant was, that the plaintiffs had not complied with the condition in their patent, by truly and correctly describing it in the specification which he had filed. But this could only be taken advantage of by a plea to that effect. There was no such plea upon the record, so that the defendant cannot now avail himself of this objection.

We do not regret that this is the result. It seems to be a valuable and new invention in fact, and the defendant has actually taken out a patent for the very same combination. This the jury thought to be a plain infringement of the plaintiffs' patent, and in this opinion of the jury we entirely concur. We should have been, therefore, sorry if a very arguable but somewhat doubtful construction of the words used to describe the plaintiffs' claim in the specification should have deprived a meritorious inventor of his proper reward.

The plaintiffs may, perhaps, do well to consider whether it may not be advisable to apply to the Attorney-General, to prevent the question as to the specification arising at any future time.

Rule discharged.

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BANDY v. CARTWRIGHT and Another.

June 8.

THE declaration stated, that the plaintiff, at the time of the making of the distress hereinafter mentioned, was in the occupation, and tenant to the defendants, of a certain messuage and premises, by virtue of a demise before then made by the defendants to the plaintiff of the said messuage and premises, at a certain rent therefore payable by the plaintiff to the defendants, and which demise was on certain terms, and amongst others on the terms, that the defendants had good title to demise the said premises to the plaintiff, and that the plaintiff should and might quietly enter and enjoy the same during the said term, free from any rents, rents-seck, or annuities charged thereon or issuing thereout. The declaration then stated, that afterwards, and during the continuance of the tenancy under the demise, one T. Squires distrained, as he lawfully might, the goods and chattels of the plaintiff then being in and upon the said messuage and premises, to satisfy the sum of 12*l.* 12*s.*, being six years' arrears of an annuity and rent-seck then due and in arrear to Squires, and granted and charged upon and issuing out of the said messuage and premises under and by virtue of a certain deed theretofore made, and before the said demise to the plaintiff, and before the defendants had anything in the said premises, and executed by one Joseph Squires, then being seised in fee of the said messuage and premises; of all which the defendants at the time of the said distress had notice. And further, that the plaintiff, in order to prevent the sale of his said goods and chattels under the said distress, and to retain the peaceable and quiet enjoyment of the said messuage and premises, was forced and obliged to and did afterwards pay to the said T. Squires the said sum of 12*l.* 12*s.*, and a further sum of 13*s.*, the costs of the said distress, making together the sum of 13*l.* 5*s.* And that,

A covenant for quiet enjoyment during the term is implied by law from a demise by parol; but not a covenant for good title.

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by reason of the said annuity and distress, the plaintiff had not had quiet enjoyment of the said messuage and premises, nor had he held the same free from incumbrances, as he ought to have had and done under and by virtue of the said demise by the defendants, nor had the defendants such good title as aforesaid at the time of the said demise; whereby the plaintiff had sustained damage to the amount, to wit, &c.

The defendants pleaded (*inter alia*) that they did not demise the said messuage and premises to the plaintiff on the terms in the declaration mentioned.—Issue thereon.

At the trial, before Lord *Campbell*, C. J., at the last Bedfordshire Assizes, it appeared, that in the year 1824 one Joseph Cartwright had granted the rent charge for which the distress had been made; and that a considerable time afterwards the premises had been demised by parol to the plaintiff by the defendants, who claimed through the mortgages of Cartwright.

It was thereupon objected, on the part of the defendants, that the declaration was not supported, that there was no express covenant for quiet enjoyment, and that such a covenant could not be implied by law from a mere parol demise. The learned Judge left the case to the jury, who found a verdict for the plaintiff, leave being reserved to the defendants to move to set that verdict aside, and to enter a verdict for them, if the Court should be of opinion that a covenant for quiet enjoyment could not be implied by law from a parol demise.

A rule nisi was obtained in the following Term, on the general ground that the declaration was not supported by the evidence (*a*).

O'Malley, Gray, and Worlledge shewed cause (May 24).
 —A covenant or undertaking on the part of the landlord,

(*a*) The rule was moved under objection taken was general. See the mistaken impression that the the end of the report of the case.

both that he has a good title and that the tenant shall quietly enjoy the occupation of the demised premises, may be implied by law from a demise by parol. [*Martin, B.*— I think that it will be found that a covenant for good title cannot be implied.] The declaration may be supported by proof of a covenant for quiet enjoyment. The allegations with respect to a good title and quiet enjoyment are divisible. The 75th section of the Common Law Procedure Act, 15 & 16 Vict. c. 76, provides, that all pleadings capable of being construed distributively shall be so taken. And the 222nd section empowers the Court “at all times” to make amendments in the proceedings, upon such terms as they may think fit. The Judge would have amended the declaration at the trial by striking out the allegation of title. The agreement between the landlord and the tenant is this: the latter agrees to take the land and to pay the stipulated rent, and the former agrees that the tenant shall have the land and enjoy it without interruption, and shall not have to make any additional payments beyond those for which he has stipulated. The words “demise and farm let,” &c., embody such an agreement. There is no efficacy to be attributed to any particular form of words, but the substance of the contract must be considered: *Nokes's case* (a). It is submitted, that the same rule equally applies whether the contract be under seal or by parol only. In *Holder v. Taylor* (b), the plaintiff declared in covenant upon a lease for years made by the word “demise,” and the breach laid was, that at the time of the making of the lease the lessor was not seised of the land but a stranger; and it was objected, that, as the plaintiff did not lay an actual entry under the lease, nor an ejectment by the true owner, the action of covenant would not lie. But the Court overruled the objection, holding that the breach of the covenant consisted in the

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(a) 4 Rep. 80 b.

(b) Hob. 12.

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lessor having taken upon himself to demise that which he could not; and they said, that "the word 'demisi' imports a power of letting, as the word 'dedi' a power of giving." In *Taylor v. Zamira* (a), Gibbs, C. J., said, "Here the case is, that this land was subject to a burthen in the hands of the defendant himself; for, before the defendant demised to the plaintiff, the land was subject to a burthen of paying this rent; and it being subject thereto, he let it to the plaintiff, as if it were free from that prior burthen, under a rent payable to himself; and when he calls for payment, payment is refused on the ground that he, the tenant, has paid the burthen to another, from which the land ought to have been free when the defendant let it to him." And the learned Judge, after stating that it appeared that the plaintiff had been compelled to pay the amount, said that the facts constituted a good answer to an avowry for rent. The language of the Judges in several cases is in the plaintiff's favour. In *Barton v. Fitzgerald* (b), Lord Ellenborough, C. J., said, "Do not the words 'bargain and sell' as much imply that the party has the thing which he professes to bargain and sell, as the word 'grant'?" In *De Medina v. Grove* (c), Parke, B., says, "The meaning of a contract to demise is, not only that a certain form of words shall be put on paper, but that the party assuming to demise shall have title to demise." And in *Sutton v. Temple* (d), Parke, B., in speaking of the word "demise," says, "The law merely annexes to it a condition that the party demising has a good title to the premises, and that the lessee shall not be evicted during the term." [Pollock, C. B.—It was recently decided by this Court, that there is no implied warranty of title in the contract of sale of a personal chattel (e).] That is so in the case of a chattel,

(a) 6 Taunt. 528.

(b) 15 East, 538.

(c) 9 M. & W. 827.

(d) 12 M. & W. 64.

(e) *Morley v. Attenborough*, 3 Exch. 500.

but the rule is different in the case of a demise of land. The cases of *Granger v. Collins*(a) and *Jackson v. Cobbin*(b) may be relied upon by the defendant; but they proceeded upon the ground that the promise laid in the declaration was larger than that which could be implied by law, the promise not being confined to a covenant for good title or quiet enjoyment. In the latter case, the plaintiff agreed that he had power to let the premises to the defendant "without restriction as to the purpose for which the same should be used and occupied." *Moore v. Pyrke*(c) cannot be considered to be law. In *Brocking v. Cham*(d), and *Leigh v. Gotyer*(e), it does not appear whether the demise was by parol or not. At all events, a covenant for quiet enjoyment is to be implied from a parol demise. The authorities already cited favour this view. The lessor surely undertakes that his tenant shall not be disturbed in the occupation of the land. In *Messent v. Reynolds*(f), it was doubted whether a contract for quiet enjoyment can be implied by law from a mere agreement to let. In *Hancock v. Caffyn*(g), *Tindal*, C. J., said, "The duty alleged is, that Caffyn, by paying over to the superior landlord the rent received from the undertenant, should protect the undertenant from the superior landlord's distress. And that is no more than one of the necessary consequences of the implied agreement on the part of every landlord for his tenant's quiet enjoyment."

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Couch in support of the rule.—The declaration was not proved. No such covenant as that alleged is to be implied by law from a simple demise by parol. The plaintiff has not been evicted, but he seeks to recover the amount of an

(a) 6 M. & W. 458.

(b) 8 M. & W. 790.

(c) 6 M. & W. 458.

(d) Cro. Jac. 425.

(e) Id. 444.

(f) 3 C. B. 194.

(g) 8 Bing. 366.

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old rent charge which he has paid. In *Stanley v. Hayes*^(a), there was a covenant by the lessor with the lessee for quiet enjoyment, without let &c. by the lessor or any other person lawfully claiming or to claim by, from, or under him. There was an entry on the lessee, and a seizure of goods on the premises by the collector of land-tax for arrears due from the lessor before the demise; and this was held to be no breach of the covenant. In Co. Litt. 101. b. it is said, "Note, that by the civil law every man is bound to warrant the thing that he selleth or conveyeth, albeit there be no express warranty; but the common law bindeth him not unless there be a warranty either in deed or law." There is no warranty of title or of quiet enjoyment on a demise of land. The rule of law is the same as that which exists in the sale of a personal chattel. *Morley v. Attenborough*^(b), therefore, applies to this case. In Sheppard's Touchstone, p. 165, it is said, "If we make a lease for years of land by the words 'demise or grant,' and there is not contained in the lease any express covenant for the quiet enjoying of the land, in this case the law doth supply a covenant for the quiet enjoying of it against the lessor, and all that come in under him by title under the term." That merely shews that the lessor is not supposed to pass a greater title than he himself possesses. If the defendants' position were correct, the lessor would be liable to make compensation to the tenant in respect of any prior incumbrances there might be attached to the land, and of which he himself knew nothing. The principle to be gathered from *Nokes's case* does not apply; for although by the particular words used in instruments under seal the covenant here relied upon may be implied, still that rule cannot be extended to parol contracts: Co. Litt. by Butler, 384. b., note.

Cur. adv. vult.

(a) 3 Q. B. 105.

(b) 3 Exch. 500.

POLLOCK, C. B., now said—In this case the plaintiff sued upon what he described in his declaration to be a covenant for quiet enjoyment and for good title. It appeared that the defendant had demised the land in question to the plaintiff at a given rent by parol, but there was no actual covenant; and therefore there was that covenant only which the law would imply. We are all of opinion, that there was not a covenant for good title, but only for quiet enjoyment during the term. The plaintiff has therefore misdescribed the covenant arising out of the relation of the parties; but we think that he ought to be at liberty, on payment of costs, to have a new trial, in order that he may amend his declaration.

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In the following Michaelmas Term, the Lord Chief Justice, upon the application of the plaintiff's counsel, certified to the Court, that the only point reserved at the trial was, whether a covenant for quiet enjoyment could be implied by law from a demise by parol; and on a subsequent day in that Term, the Court gave judgment that the rule should be discharged.

Rule discharged accordingly.

1853.

June 10.

JONES v. GIBBONS.

To an action for not delivering iron sold by the defendant to the plaintiff under a contract "to be delivered as required," the defendant pleaded, that the plaintiff did not, within a reasonable time, request the defendant to deliver the iron. Replication, that the plaintiff, so soon as the iron was required by him, requested the defendant to deliver it. On demurrer to the replication,—*Held*, that the plea was bad, since the defendant was bound to inquire of the plaintiff whether he would have the iron, before he could rescind the contract on the ground that he was not, within a reasonable time, required to deliver it.

THE declaration stated, that the plaintiff, at the request of the defendant, bought of the defendant, and the defendant sold to the plaintiff, on certain terms agreed on, a quantity of iron, to be delivered to the plaintiff at his works as required, and to be paid for in bills at four months. Breach: That the defendant, although requested so to do, did not deliver the iron.

Plea.—That the plaintiff did not, within a reasonable time after the making of the contract, request the defendant to deliver the iron, but after a reasonable time had elapsed.

Replication.—That the plaintiff, so soon as the iron was required by him, requested the defendant to deliver it.

Demurrer and joinder therein.

Needham in support of the demurrer.—Assuming that the plea is good, the replication affords no answer to it. The question raised by the plea is, whether, for a contract to deliver goods "as required," the vendee is not bound within a reasonable time to require their delivery? The plaintiff must contend, that, as no time is specified, the defendant would be bound, if requested, to deliver the iron at any time during the lives of the parties. That would be in effect to deliver in an unreasonable time. It is not unusual to find contracts silent as to time; and in such case the law implies that they will be performed in a reasonable time. Thus, where a vendor undertakes to deduce title, and no precise time is fixed for that purpose, he has a reasonable time to do it: *Sansom v. Rhodes* (a). *Stavart v. Eastwood* (b) is an authority to the same effect. Also, where a statute empowers a Judge at Nisi Prius to certify *immediately*, that has been construed to mean with-

(a) 6 Bing. N. C. 261.

(b) 11 M. & W. 197.

in a reasonable time: *Christie v. Richardson* (a). So, a clause in an award, directing payment of costs "immediately after the execution of the award," has been held to mean within a reasonable time after notice: *Hoggins v. Gordon* (b). And in *Pybus v. Mitford* (c) it is said, "the word *immediately*, although in strictness it excludes all mean times, yet to make good the deeds and intents of parties, it shall be construed such convenient time as is reasonably requisite for doing the thing; as in the 18 Edw. 1. 21, an award to make an obligation immediately to J. S. (then absent) is intended such a convenient time as he can get to him." Supposing the iron to exist at the time of the contract, it might in the course of years oxidize, decay, or lose weight; so that the loss would exceed the benefit to be derived from the contract, if executed within a reasonable time. [*Alderson*, B.—Perishable goods would afford a better illustration.]

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Bramwell, contra.—The plea is bad. The question is, what bargain has the defendant entered into? He has undertaken to deliver the iron *as required*, and if the defendant's construction of the contract be right, he ought to have given the plaintiff notice that he was ready to deliver it. The defendant has no right to abstain for a long period, and then complain that no request was made by the plaintiff within a reasonable time. [*Martin*, B.—In *Sheppard's Touchstone*, tit. "Obligation," c. 21, p. 378, it is said: "Where the thing to be done is local, and the concurrence of both parties necessary thereunto, and the act is to be done by the obligor himself, or by a stranger, to the obligee himself, as where the condition is, that the obligor or a stranger shall enfeoff the obligee; in this case, the obligor or the stranger shall have time to do it during his life, unless the obligee do hasten it by request; and if he request it sooner, then it must be done in a convenient time after

(a) 10 M. & W. 688. (b) 3 Q. B. 466. (c) 2 Lev. 77.

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request made."] That principle applies here. The plaintiff was only bound to require the delivery within a reasonable time after he was requested by the defendant to do so.

Needham, in reply.—If the contract had been to deliver within a month after the defendant was required to do so, could it have been contended that the defendant was bound to request the plaintiff to require him to deliver within a month? Then, can there be any such obligation where the contract is to deliver, if requested, within a reasonable time? The duty is on the plaintiff to do an act which was peculiarly within his own knowledge. [*Alderson*, B.—So soon as a reasonable time elapsed, it was competent for the defendant to say "I desire you to ask me to deliver the iron now or never."] *Pollock*, C. B.—The defendant reads the contract as if the condition which the law implies were part of it. No doubt, where a contract is silent as to time, the law implies that it is to be performed within a reasonable time; but there is another maxim of law, viz., that every reasonable condition is also implied; and it seems to me reasonable that the party who seeks to put an end to the contract, because the other party has not, within a reasonable time, required him to deliver the goods, should in the first instance inquire of the latter whether he means to have them.]

PER CURIAM (a).—There must be judgment for the plaintiff.

Judgment for the plaintiff.

(a) *Pollock*, C. B., *Alderson*, B., *Platt*, B., and *Martin*, B.

END OF TRINITY TERM.

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TO THE

PRINCIPAL MATTERS.

ABSCONDING DEBTORS ACT.

(1). *Service of Capias, within what Time.*

Under the Absconding Debtors Act, 14 & 15 Vict. c. 52, the capias must be issued and served within seven days after the warrant is obtained, where the capias is issued upon the same materials as the warrant; and if not so issued and served, the capias and warrant are both void, and the debtor is entitled to his discharge; or if he has deposited money under the statute, he is entitled to a return of it. This rule does not apply to a capias obtained upon fresh materials, which need not be executed within the above-named period. *Masters v. Johnson*, 63

(2). *Service of Capias, when not necessary.*

Where a party has been arrested under a warrant granted under the Absconding Debtors Act, 14 & 15 Vict. c. 52, and, upon making a deposit in lieu of bail, has obtained his discharge from custody, the writ of capias, which is required by the Act to be issued, need not be served upon him; and the case is the same, although he be, at the time the capias

ADMINISTRATOR.

is issued, and continues, in custody at the suit of a third party. *Eld v. Vero*, 655

ACCEPTANCE.

See STATUTE OF FRAUDS.

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See STATUTE OF LIMITATIONS.

ACT OF BANKRUPTCY.

See BANKRUPT, (2).

ADMINISTRATOR.

(1) *Doctrine of Relation.*

The doctrine of relation, by which the letters of administration are held to relate back to acts done between the death of the intestate and the taking out of the letters of administration, exists only in those cases where the act done is for the *benefit* of the estate.

The widow of an intestate remained in the possession of her husband's property for some time after his decease. The intestate's son did not interfere in any way with the property, which was seized under a writ

of fl. fa. issued against the widow. The son afterwards took out letters of administration:—*Held*, first, that there was no evidence of the administrator's assent to the widow's taking the property; and, secondly, that if such an assent could be implied, the estate was not bound by it, as the act to which the assent was given did not benefit the estate. *Morgan v. Thomas*, 302

(2). *Detinue by Administrator.*

Detinue cannot be maintained by an administrator against a person who has had possession of the goods of the intestate, but has ceased to hold them prior to the grant of administration.

Where stock in the public funds is purchased in the joint names of two persons, the survivor is, *at law*, absolutely entitled to it. *Crossfield v. Such*, 825

ADMIRALTY.

See CONSISTORIAL COURT. FREIGHT.

(1). *Prohibition.*

After an action brought by a ship-owner against the charterer for freight, a monition was issued out of the Court of Admiralty at the suit of the obligee of a bottomry bond, directing the defendant to pay the amount of the freight (which exceeded the amount secured by the bottomry bond) into the registry of that Court; which the defendant, accordingly did. This Court refused a writ of prohibition to stay all further proceedings in the Court of Admiralty, although the affidavits in support of the application for the writ suggested that the proceedings were conducted collusively, and to defeat the plaintiff's claim. *In re Place*, 704

(2). *Admiralty Regulations.*

Under the 14 & 15 Vict. c. 79, by

which the Lords of the Admiralty are empowered to make regulations with respect to steam navigation and to the boats and lights to be carried by sea-going vessels, certain regulations were published with regard to "sailing vessels," by which "all sailing vessels at anchor in roadsteads or fairways shall be bound to exhibit, between sunset and sunrise, a constant bright light at the masthead, except within harbours or other places where regulations for other lights for ships are legally established."—*Held* that, under this regulation, every sailing vessel lying at anchor, either in the roadstead or fairway of a stream, is bound to exhibit a bright light at the masthead, unless there be some local provision for a different description of light to be borne by that class of vessels.

The 28th section of the 14 & 15 Vict. c. 79, enacts, that, in case of a collision between two or more vessels, if it appears that such collision was occasioned by the non-observance of the foregoing rules with respect to the exhibiting of lights, the owner of the vessel by which any such rules has been infringed shall not be entitled to recover any recompense whatsoever for any damage sustained by such vessel in such collision, unless it appears to the Court before which the case is tried that the circumstances of the case were such as to justify a departure from the rule.

Where a vessel, through sheer negligence, injures another vessel by running her down at night, the mere fact that the injured vessel was at the time guilty of an infringement of the Admiralty rules by not exhibiting a light, affords no justification under the preceding section, where the absence of the light does not in any way contribute to the accident. *Morrison v. General Steam Navigation Company*, 733

AGREEMENT.

AFFIDAVIT.

See COMMON LAW PROCEDURE ACT,
(5), (6).
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AGENT.

See RAILWAY COMPANY, (4).
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AGREEMENT.

See DEMISE.
HUSBAND AND WIFE, (1).
STAMP, (2).

A declaration stated, that, by a certain contract, the plaintiffs agreed that they would, during a certain term, supply to the defendants, and that the defendants would take from them, all the coke the defendants' Company should require at L., according to the capacity of certain ovens, provided that the said coke should be of the best quality; the plaintiffs on their part engaging that the same should be large, and of the best quality, and equal to that made from the best B. coal, *and be to the satisfaction of the said Company's inspecting officer for the time being*; and agreeing that the said Company should have power to refuse to accept coke of inferior quality or small in its pieces; and to purchase what they might require elsewhere if the plaintiffs did not supply coke of the best quality, and equal to that above described, *and to the satisfaction of the said Company's said officer*, and to charge the plaintiffs with the excess of price beyond the said contract price. The declaration then contained an averment, that, during the term, the plaintiffs manufactured and supplied to the defendants, in the manner provided by the said agreement, certain coke, which they required at L., which was of the quality required

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by the agreement, and equal to that made from the said B. coal, and large in its pieces; and laid as a breach the refusal of the defendants to accept the said coke:—*Held*, that, according to the true construction of the agreement, it was a condition precedent to the right of the plaintiffs to insist upon the defendants' acceptance of the coke, that it should be to the satisfaction of their inspecting officer; and consequently, that the declaration, which omitted that allegation, was bad in substance. *Grafton v. The Eastern Counties Railway Company*, 699

AMENDMENT.

See COMMON LAW PROCEDURE ACT, (7).

ANNUAL RENT OR VALUE.

See COUNTY COURT, (6).

ANNUITY.

See LEGACY DUTY, (1).

Enrolment.

A deed does not require enrolment under the 53 Geo. 3, c. 141, s. 2, as a grant of an annuity, unless the alleged grantor is a party to the instrument.

A., by deed, granted an annuity to B.; a memorial of this deed was duly enrolled. B. subsequently released to A. by deed (which was not executed by A.) two-fifths of this annuity:—*Held*, that the second deed did not require enrolment under the 53 Geo. 3, c. 141, s. 2. *Humphreys v. Jenkinson*, 684

ARBITRATION.

See INSURANCE, (3).

ARREST OF JUDGMENT.

See LOCAL ACTION.

ATTESTING WITNESS.

See EVIDENCE, (2).

AUCTIONEER.

See DISTRESS.

BAIL.

See PRACTICE, (5).

BANKRUPT.

See LANDLORD AND TENANT, (1).
PROMISSORY NOTE.

(1). *Contingent Debt.*

The defendant, as surety, entered into a bond in a penal sum, with the condition that if he should pay to the plaintiff such costs as he should, in due course of law, be liable to pay in case the verdict should pass for the then defendant in an action pending, which had been brought by one C. in the name of the plaintiff, such costs to be first taxed by one of the Masters in the usual manner, the bond was to be void. The action mentioned in the condition was a scire facias on a judgment obtained by the plaintiff, and which had been assigned to C. by T. H., since deceased, of whom the plaintiff was executor. The action was tried at the Spring Assizes in 1848, when a verdict was found for the defendant. In the following Easter Term a rule nisi for a new trial was obtained. On the 14th of November following, a fiat in bankruptcy issued against the defendant. In Hilary Term, 1849, the rule for the new trial was discharged. On the 29th of May, the defendant obtained his certificate, and on the 22nd of August the costs were taxed:—*Held*, that, at the time the fiat issued, the defendant's liability under the bond

was a mere contingent liability, and not a contingent debt, within the Bankrupt Act, 6 Geo. 4, c. 16, s. 56; and therefore that the plaintiff's claim for the costs was not barred by the defendant's certificate. *Hankin v. Bennett*, 107

(2). *Act of Bankruptcy.*

1. Where a trader, who, upon summons to the Court of Bankruptcy, appears and signs an admission for part only of the demand of the creditor, and also makes a deposition, that he believes he has a good defence upon the merits to the residue of the demand, and does not pay the sum so admitted, a petition for adjudication of bankruptcy, being filed against him within two months, &c., he does not commit an act of bankruptcy within the meaning of the 82nd section of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106. *Oldfield v. Dodd*, 578

2. The assignment by way of mortgage by a trader of his stock and implements of trade, where such assignment does not include a moiety of the whole of his effects, is not *per se* an act of bankruptcy, although the effect of putting the instrument in force would be to stop the business.

A manufacturer assigned, by way of mortgage, all his machinery, as a security for certain bills of exchange drawn by him upon certain of his customers, accepted by them, and discounted by the mortgagor, and also for such other bills as should, from time to time, be discounted in like manner; and the amount of the security was not to exceed 2000*l*. And the mortgagee was empowered, in default of payment of the bills three days after demand, to enter the premises, and to take possession of all the machinery, and to sell the same,

and, after payment of the amount of the bills then due or running, to pay the surplus of the proceeds of the sale to the mortgagors. At the time of the execution of the deed the machinery was worth 1500*l.*, and the trader's effects much exceeded 3000*l.*; and he deposed that the deed was executed with a view to obtain cash for the bills, and without any intent to defeat or delay his creditors:—*Held*, that there was no evidence to constitute the execution of the assignment an act of bankruptcy; and further, that, if there had been any such evidence, the proper question for the jury was not, whether the deed, if acted upon, would have stopped the business, but whether it would have produced insolvency. *Young v. Waud*, 221

(3). *Certificate.*

Held, in the Exchequer Chamber, affirming the judgment of the Court of Exchequer, that a certificate granted by a Commissioner in bankruptcy to a petitioning trader under the 221st section of the 12 & 13 Vict. c. 106, is binding on those persons only who were creditors at the time of the petition and had notice of the sittings of the Court, as required by the Act. Therefore, where a petitioning trader, being the acceptor of a bill of exchange, gave the requisite notice to the drawer of the bill, whom he supposed to be the holder, the certificate was held invalid against an indorsee without notice, who was in truth the holder, notwithstanding the trader had no means of ascertaining that fact. *Wesson v. Allcard*, 260

(4). *Execution.*

An execution against the goods of a bankrupt is valid, within the 12 & 13 Vict. c. 106, s. 133, when the sheriff executes the bill of sale, not-

withstanding it contains a clause of indemnity to the sheriff by the execution creditor, and is not executed by the latter until after he has had notice of an act of bankruptcy. *Christie v. Wilmington*, 287

(5). *Meaning of the word "now" in the 224th section of the 12 & 13 Vict. c. 106.*

The 224th section of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, which enacts, that "every deed or memorandum of arrangement *now* or hereafter entered into" between the trader and his creditors, and executed by six-sevenths in number and value of those creditors whose debts amount to 10*l.* and upwards, touching the trader's liabilities and his release therefrom, and the distribution, inspection, &c., and winding-up of his estate, shall be obligatory in all respects upon all the creditors who shall not have signed such deed, &c., as if they had duly signed it, does not operate upon such instruments as were entered into and *completed* before the passing of that statute. But the section does apply to such instruments as were entered into before, and were inchoate at the time of the passing of the Act, and have been completed since that time. *Waugh v. Middleton*, 352

(6). *Order of Court of Bankruptcy.*

By the order which is required by the 125th section of the 12 & 13 Vict. c. 106, to vest the property in goods which are in the order and disposition of the bankrupt as reputed owner, in the assignees or vendee of the goods, their title has relation back to the act of bankruptcy, in the same way as the title of the assignees has by the general assignment.

An order made by the Court of Bankruptcy stated, that "the said J. A. (the bankrupt) had, at the time he became bankrupt, by the consent of R. H." (the owner), "who then claimed and still claims to be true owner thereof, in his the said J. A.'s possession, order, and disposition, divers goods," &c., i. e. the goods in question:—*Held*, that the order was good, although it did not state positively that R. H. was, in fact, the true owner of the goods.

In an action of trover by the owner of the goods against the assignees of the bankrupt, the defence, that the goods were at the time of the bankruptcy in the order and disposition of the bankrupt with the consent of the true owner, and that the title to the goods vested in the assignees by virtue of an order made by the Court of Bankruptcy, is admissible under a plea of not possessed, although the order was applied for and made after action brought. *Heslop v. Baker*, 411

BILL OF EXCHANGE.

See BANKRUPT, (2).

PLEADING III., (3).

(1). *Lost Bill.*

To an action for goods bargained, sold, and delivered, the defendant pleaded, as to 42*l.*, parcel, that before action he accepted a bill of exchange for that amount, drawn on him by the plaintiff, payable to the plaintiff's order five months after date; that the plaintiff took and received such bill for and on account of the said sum of 42*l.*; and the plaintiff afterwards lost such bill out of his possession, and from thence hitherto the same has remained so lost, and the plaintiff has been unable to produce it, and ceased to have any power or control over it; and the defendant has never since such loss found such bill, nor known

where it was to be found, nor had any power or control over it:—*Held*, that the plea was bad in substance, for not alleging that the bill was lost at maturity. *Clay v. Crowe*, 295

(2). *Holder of Bill.*

The holder of a bill of exchange indorsed in blank, being unwilling to sue in his own name upon it, requested one K., who had guaranteed the payment of it, to get some one to sue for him upon it: K. accordingly requested one E., the plaintiff, to sue upon the bill, to which he assented; K. therefore applied to the holder for a copy of the bill. The holder delivered the bill to K., who, after having taken a copy, returned it again immediately, upon the understanding that the plaintiff should have it whenever he required it. The bill was not handed to the plaintiff till after action brought:—*Held*, that the plaintiff had neither any interest in the bill nor any possession of it, and therefore that he could not maintain the action upon it. *Emmett v. Tottenham*, 884

BILL OF LADING.

See SHIP, (1), (2), (3).

BILL OF SALE.

See BANKRUPT, (4).

BOND.

See BANKRUPT, (1).

OVERSEER.

STAMP, (1).

Joint and several.

To an action on a joint and several bond in the penal sum of 2800*l.*, given by the defendant, J. O., and M. N.,

BOND.

conditioned for the payment of 1400*l.*, the defendant pleaded—

First, that the sum mentioned in the bond was secured by a warrant of attorney of even date therewith, upon which judgment was to be forthwith entered up, given by J. O. to the plaintiff; and that J. O., after the day conditioned for payment of the principal sum, paid the same, with interest, to the plaintiff.

Secondly, that plaintiff sued J. O. for the detention of the monies in the declaration mentioned in respect of the bond, that he obtained judgment, and took in execution goods of J. O. to the amount of 1417*l.*

Thirdly, that, at the time of entering into the bond, J. O., and the defendant and M. N. as his sureties, executed a warrant of attorney, upon which the plaintiff was authorised to enter up judgment forthwith for 2800*l.*, for securing the payment of the sum of 1400*l.*, but that execution should not issue except in case of default being made; that plaintiff afterwards sued J. O. for the said debt of 2800*l.*; that J. O. became bankrupt; that plaintiff omitted to file the warrant of attorney as required by 3 Geo. 4, c. 39; that certain goods of J. O. were taken in execution under the judgment so obtained; and that thereby the plaintiff suspended his remedy against the principal and discharged the defendant, the surety.

Replication to second plea—That, by reason of the omission to file the warrant of attorney, the plaintiff was compelled to refund to the assignees of J. O. the proceeds of the execution. Similar replications to the first and third pleas.

Held, that the facts disclosed by the pleadings afforded no defence at law to the action. *Parker v. Watson*,

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BOTTOMRY BOND.

See ADMIRALTY.

BRIDGE.

See COUNTY SURVEYOR.

BROKER.

See FRAUD.

BURGESS.

See MUNICIPAL CORPORATION ACT.

BURIAL FEES.

In the year 1823, a piece of ground in the parish of St. Margaret, Leicester, was purchased by subscription of the inhabitants, and conveyed to the commissioners for building new churches, who erected a chapel on part of it, and inclosed the remainder for a burial ground. In 1827, the chapel and burial ground were consecrated. In 1828 an Order in Council was made and published, whereby, after reciting the 16th section of the 58 Geo. 3, c. 45, which empowers the commissioners to divide populous parishes into two or more distinct and separate parishes; also reciting the 21st section of that statute, which empowers the commissioners to divide populous parishes into ecclesiastical districts; also reciting that the commissioners had made a representation to the Crown respecting the increase of population and insufficient church accommodation in the parish; also reciting, that it appeared to the commissioners expedient that an *ecclesiastical district* should be assigned to the new chapel *under the provisions of the 59 Geo. 3, c. 134*; and that the consent of the bishop had been obtained: his Majesty ordered that the proposed *division* should be made and effected according to the provisions

of the said Acts. The boundaries of the district were duly enrolled under the 58 Geo. 3, c. 143, s. 22. No Order in Council was made respecting the performance of the offices of the Church in the said chapel, or the appropriation of the fees payable in respect thereof, nor did the commissioners make any order as to whether the fees for burials, &c. were to be reserved to the incumbent of the parish, or assigned to the curate of the chapel, or whether burials, &c. should be performed in such chapel. In the year 1848, the corporation of Leicester established a cemetery within the borough, under the provisions of the 11 Vict. c. ii, by which the burial service over deceased persons removed for interment in the cemetery was to be performed by, and the fees paid to, the incumbent who might have been required to perform the service, and would have been entitled to the fees, if the interment had taken place in his parish or ecclesiastical district:—*Held*, that the Order in Council was made under the 58 Geo. 3, c. 45, s. 21, and not under the 59 Geo. 3, c. 143, s. 16; and that, upon enrolment of the boundaries, the chapelry became a separate district parish for all ecclesiastical purposes; and that, after the death of the then incumbent of the original parish, the curate of the district parish was entitled to the fees for burial, both in his parish and in respect of deceased persons removed therefrom for interment in the cemetery. *Edgell v. Burnaby*, 788

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JOINT-STOCK COMPANY, (2).
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CARRIER.

See RAILWAY COMPANY, (1), (4).

CERTIFICATE

See BANKRUPT, (1), (3).

CHANCERY PROCEDURE ACT.

The 61st section of the Chancery Procedure Amendment Act, 15 & 16 Vict. c. 86, which enacts, that "it shall not be lawful for the Court of Chancery in any cause or matter to direct a case to be stated for the opinion of any Court of common law," is prospective, and therefore does not apply to cases in which an order has been made before the Act came into operation (1st November, 1852).

Quære, whether the Act applies to cases involving questions in which the Crown is directly concerned.
Hobson v. Neale, 131

CHAPELRY.

See BURIAL FEES.

CHARTERPARTY.

See STATUTE OF SET-OFF.

The plaintiffs chartered a vessel of the defendants to carry a cargo from Liverpool to Calcutta. The charterparty contained a clause that the vessel was to be consigned to E. & Co., merchants at Calcutta, on the usual terms. One of those terms was, that E. & Co. might procure the homeward freight at 5*l.* per cent. commission. The defendants consigned the vessel to E. & Co., but contracted with another party for the homeward freight. The plaintiffs, having agreed with E. & Co. for a share in the commission, brought an action against the defendants for

their breach of contract, but failed to prove in what proportion the commission was to be divided:—*Held*, that, as the clause was inserted for the benefit of E. & Co., the plaintiffs were entitled to recover as trustees on their behalf, notwithstanding they failed to shew their interest in the commission. *Robertson v. Wait*, 299

CHURCHWARDEN.

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See SOCIETY FOR THE PROTECTION OF TRADE.

COAL MINE.

See MINE.

COHABITATION.

See HUSBAND AND WIFE, (2).

COMMISSION OF SEWERS.

In the year 1819, a level was taken and survey made of lands in Bilsby, in Lincolnshire, liable to be rated to a drain called the Boy Grift, and the Court of Sewers directed a precept to the sheriff, requiring him to summon jurors *de corpore comitatûs*, to appear at a certain place and time, and make a presentment. The sheriff having, under this precept, summoned a jury from the hundred of Calceworth, in the said county, in May, 1819, they made a presentment, that the Boy Grift was ruinous, and that certain works therein were absolutely necessary; and that lands in the occupation of various persons, including the plaintiff, received benefit or avoided danger by the drainage, and ought, therefore, to bear the charges thereof; and they, accordingly, assessed a rate, which the com-

missioners confirmed. No appeal was made against this presentment or assessment; and in 1823, a special law of sewers was enrolled, containing the presentment, and from that time to the year 1837 all rates were made under such law. No level had been taken or survey made since 1819, nor had any presentment of a jury been made since 1837. In 1840, a new commission of sewers issued; and at the first court holden under it, it was ordered "that all laws, acts, deeds, constitutions, and ordinances of sewers held for the county of Lincoln, and which had not been repealed, altered, or superseded, should be confirmed and stand in full force." In 1846, at a meeting of the commissioners, the dike-reeve required them to authorise him to make a rate according to the above-mentioned survey by level, and without any presentment of a jury, which the commissioners authorised him to do. In 1847 and 1848 similar rates were made, without any presentment of a jury. The plaintiff having refused to pay these rates, the commissioners issued a distress warrant, under which his goods were taken, whereupon he brought an action of trespass:—*Held*, first, that the confirmation of the special law of 1823, by the order of the new commissioners in 1841, rendered the presentment of 1819 operative and applicable to the rates in question, and consequently that they were valid.

Semble, that, upon a representation of a change of circumstances arising since the presentment, it would be competent for the commissioners to inquire into the facts by a fresh presentment, the 17th section of the 3 & 4 Will. 4, c. 22, being framed for that purpose.

Secondly, that it was no objection to the presentment that the sheriff summoned the whole of the jury from

the hundred of Calceworth. *Taylor*
v. *Left*, 269

COMMON LAW PROCEDURE ACT.

See FREIGHT.

PLEADING II., (1).

(1). *Judgment against the Casual Ejector.*

Where the declaration in ejectment was served before the Common Law Procedure Act, 15 & 16 Vict. c. 76, came into operation:—*Held*, that in such case the old proceeding by motion for judgment against the casual ejector was correct. *Doe d. Smith v. Roe*, 127

(2). *Judgment as in case of a Non- suit.*

The Common Law Procedure Act, 15 & 16 Vict. c. 76, which abolishes the old mode of proceeding for judgment as in case of a nonsuit, applies to cases where issue has been joined and default made in going to trial in pursuance of notice before that Act came into operation. *Morgan v. Jones*, 128

(3). *Judgment as in case of a Non- suit in Ejectment.*

The Common Law Procedure Act, 15 & 16 Vict. c. 76, has repealed the provisions of the 14 Geo. 2, c. 17, for judgment as in case of a nonsuit, as well in actions of ejectment as in ordinary actions. *Doe d. Leigh v. Holt*, 130

(4). *Signing Judgment for want of a Plea.*

The 27th and 28th sections of the Common Law Procedure Act, 15 & 16 Vict. c. 76, apply only to cases of future non-appearance. Therefore,

where the plaintiff entered an appearance for the defendant *sec. stat.* before that Act came into operation, and afterwards filed a declaration indorsed with notice to plead, but gave the defendant no notice of the filing thereof:—*Held*, that judgment signed for want of a plea was irregular. *Goodliffe v. Neaves*, 134

(5). *Pleading and Demurring at same Time.*

A declaration alleged that the defendant requested the plaintiff to lend him a sum of money, and falsely, fraudulently, and deceitfully represented to the plaintiff that the defendant had attained the age of twenty-one years; and that the plaintiff, confiding in the truth of the said representation and pretence, did lend the defendant a sum of money, &c.; whereas the defendant had not, at the time of his making the said representation and pretence, attained the age of twenty-one, but was an infant under that age, as the defendant at the time of his making the said representation well knew; and that the defendant refused to repay the said loan, &c.; whereby the plaintiff had been damaged, &c. The Court permitted the defendant, under the Common Law Procedure Act, 15 & 16 Vict. c. 78, s. 80, both to demur to this declaration, and to plead, first, not guilty, and secondly, a traverse that the plaintiff confided in the alleged fraudulent representation, upon an affidavit of the defendant's attorney, which stated that he was advised and believed that the defendant had, under the circumstances aforesaid, just ground to plead not guilty to the declaration, and also a traverse that the plaintiff confided in the alleged fraudulent representation, and that he was also advised and believed that the declaration would be held bad in

substance on demurrer. *Price v. Hewett*, 146

(6). *Vacant Possession.*

Upon a motion for judgment on a writ of ejectment, under the 210th section of the Common Law Procedure Act, 15 & 16 Vict. c. 76, an affidavit, which states, *inter alia*, that three quarters of a year's rent was due from the tenant before the copy of the writ was affixed to the premises; and that, at the time the copy was affixed, "no sufficient distress was to be found upon the said premises countervailing the said arrears of rent," is sufficient. *Cross v. Jordan*, 149

(7). *Amendment of Pleading.*

To a declaration on a specialty, the defendant pleaded the Statute of Limitations, 3 & 4 Will. 4, c. 42, s. 3, to which the plaintiff replied, "that the defendant, before the commencement of the suit, made an acknowledgment that the debt remained unpaid and due to the plaintiff within the true intent and meaning of the statute; and that the action was brought within twenty years after such acknowledgment:—*Held*, that the replication was a pleading so framed as to prejudice the fair trial of the cause, within the 15 & 16 Vict. c. 76, s. 52, and ought to be amended by specifying the mode of acknowledgment relied on. *Forsyth v. Bristowe*, 347

(8). *Judgment.*

The 128th section of the Common Law Procedure Act, 15 & 16 Vict. c. 76, applies to judgments signed more than a year and a day, but less than six years, before that Act came into operation. *Boodle v. Davis*, 351

(9). *Allowance of several Pleas.*

In an action for the infringement of a patent, the Court (since the Common Law Procedure Act) allowed the defendant to plead—first, not guilty; secondly, that the patentee was not the inventor; thirdly, non concessit; fourthly, that the invention was not a manufacture; fifthly, that the invention was not new; and, sixthly, that no sufficient specification was enrolled. *Platt v. Elae*, 364

COMPOSITION.

A declaration stated that, J. being indebted to the plaintiff in a certain sum, the defendant, by his agent, wrote to the plaintiff as follows:—"Without prejudice to any proceedings you may think proper to take, Mr. A. (the defendant) offers to pay a composition of 7*s.* in the pound on your account against his nephew J., on your giving proper indemnification to both. In the event of your accepting the offer, I will thank you to forward me the full particulars of your account, in order that the same may be properly examined." Averment, that the plaintiff accepted the offer, and thereupon forwarded full particulars of his account; and, although the plaintiff has always been ready and willing, and offered, to give a proper indemnification, yet the defendant has not paid the composition:—*Held* bad on general demurrer, as not shewing any binding contract, but a mere offer to pay. *Cope v. Albinson*, 185

CONCURRENT JURISDICTION.

See COUNTY COURT, (1).

CONDITION PRECEDENT.

See AGREEMENT.

COVENANT, (2).

INSURANCE, (7).

CONSIDERATION.

See HUSBAND AND WIFE, (1).

JOINT-STOCK COMPANY, (2).

PLEADING I.

STAMP DUTY.

CONSISTORIAL COURT.

Jurisdiction—Irregularity in Proceedings.

Where a Court has jurisdiction over a suit, mere irregularities in the proceedings in the suit do not afford any ground for a prohibition.

In August, 1850, a party was cited to appear in the Consistorial Court to answer in a suit instituted against him by his wife for restitution of conjugal rights. He duly appeared, and was heard. After some further proceedings in the suit, on the 9th of June, 1851, two decrees, ordering him to receive his wife, and to pay alimony, were made in his absence, and without any previous notice thereof to him. On the 2nd of September he received notice of the decrees, and also that, if he did not obey them, he would be held in contempt:—*Held*, that the want of notice of the decrees, even if required by the practice of the Ecclesiastical Court, did not afford any ground for a prohibition; but that the party's remedy was either by application to the Court itself, or by appeal. *Ex parte Story*, 195

CONTINGENT LIABILITY.

See BANKRUPT, (1).

CONTRACT.

See INSURANCE, (1).

JOINT-STOCK COMPANY, (2).

PLEADING II., (3).

RESCISSION OF CONTRACT.

CONVERSION.

See LOCAL ACTION.

CORPOREAL HEREDITAMENT.

See COUNTY COURT, (4).

COSTS.

See BANKRUPT, (1).

COUNTY COURT, (1).

GUARANTEE.

SPECIAL JURY.

- (1). *Costs of Search for Documents and of copying Briefs after New Trial granted.*

The defendants in an action of replevin having obtained a verdict, a rule for a new trial was granted, on the ground that certain evidence had been improperly admitted. This rule was made absolute. The plaintiff gave a fresh notice of trial, but afterwards gave notice of discontinuance, and the cause was not again tried. On the taxation, the costs of certain searches for documentary evidence (not including the evidence objected to), which had been made use of on the first trial, were allowed to the defendants, as well as the charge of drawing and copying the old briefs:—*Held*, that, as these matters would have been available if the cause had been tried again, such costs were properly allowed. *Daniel v. Wilkin*, 156

(2). *When Application for Costs to be made under 15 & 16 Vict. c. 54.*

A cause was tried in one of the superior Courts, in February, 1852; and the plaintiff obtained a verdict, and accepted the damages awarded. In February, 1853, the plaintiff applied for an order for costs under the 15 & 16 Vict. c. 54, s. 4. The defendant had been in the interim absent abroad:—*Held*, that the application for costs was in time. *Reid v. Gardner*, 651

COUNTY COURT.

See Costs, (2).

(1). *Concurrent Jurisdiction.*

Where one of several plaintiffs dwells more than twenty miles from the defendant, the Superior Courts have concurrent jurisdiction with the county court. *Hickie v. Salamo*, 59

(2). *Incorporeal Hereditament.*

A claim of a custom for the occupiers of wharfs on a navigable river to overlap the adjoining wharfs with their vessels, when being loaded or unloaded, does not raise any question of title to an incorporeal hereditament or a franchise, so as to exclude the jurisdiction of the county court by the 58th section of the 9 & 10 Vict. c. 95. *Davis v. Walton*, 153

(3). *Jurisdiction—Devise.*

A plaintiff in a county court claimed, by his particulars of demand, 17*l.* 8*s.* "due from the defendant as administratrix of D., for that W. by his will bequeathed to D. certain freehold hereditaments, and also leasehold and other personal estate, on condition of D. paying unto the plaintiff 4*s.* a week during her life. And D., on the death of W., accepted the be-

quest, and entered into possession, and enjoyed the aforesaid freehold and personal estate, and duly paid the weekly sum during his life; but since his death the defendant, although she has possessed herself of the hereditaments, goods, &c., of D., to an amount more than sufficient for the purpose, has refused to pay the plaintiff." It appeared that, on the death of D., the freehold estates so bequeathed descended to his nephew and heir-at-law, a minor. On motion for a prohibition:—*Held*, that the sum in question was claimed as a debt, and, consequently, the county court had jurisdiction. But this Court ordered a certiorari to issue on account of the legal difficulties in the case. *Longbottom v. Longbottom*, 203

(4). *Corporeal Hereditament.*

On the trial of a plaint for a trespass committed by breaking the doors of certain rooms in a cottage of the plaintiff, the plaintiff's case was, that he had let the defendant a portion only of the cottage, and had reserved to himself the rooms in which the trespass was committed. The defendant's case was, that the plaintiff had let him the whole of the cottage:—*Held*, that title to a corporeal hereditament was in dispute under the 58th section of the 9 & 10 Vict. c. 95, and that the county court had no jurisdiction over the plaint. *In re Chew v. Holroyd*, 249

(5). *Abandonment of Excess above 50*l.**

The county court has no jurisdiction to try a cause where the plaintiff, on the face of the summons, claims a sum exceeding 50*l.*, although he thereby also proposes to allow a set-off to reduce it below that sum, where such set-off has not been al-

lowed by the defendant before action, or admitted by him at the trial.

In such case the county court cannot obtain jurisdiction by the plaintiff's offering at the trial to abandon the excess above 50*l.* *Awards*, App.; *Rhodes*, Resp., 312

(6). *Annual Rent or Value.*

Under the 122nd section of the 9 & 10 Vict. c. 95, by which the landlord of any house, land, or other hereditament may, after the interest of the tenant has expired, enter a plaint in the county court to recover possession of the premises "where the value of the premises, or the rent payable in respect of such tenancy, did not exceed the sum of 50*l.* by the year, and upon which no fine shall have been paid," the county court has jurisdiction if either the rent, no fine having been paid, or the annual value of the premises did not exceed 50*l.*—Per *Pollock*, C. B., *Platt*, B., and *Martin*, B.; dubitante *Alderson*, B. *In Re Earl of Harrington v. Ramsay*, 879

COUNTY SURVEYOR.

An action for a personal and peculiar damage resulting from the want of proper repair to a county bridge will not lie against the county surveyor, either at common law or under the statute 43 Geo. 3, c. 59. *McKinnon v. Penson*, 319

COVENANT.

See LANDLORD AND TENANT, (2), (4).
PUBLIC HEALTH ACT.
RAILWAY COMPANY, (2).

(1). *Discharge of Covenant.*

A covenant for payment of a sum certain, although the payment does not accrue until after notice given, cannot be discharged by parol before breach. *Spence v. Healey*, 668

(2). *Condition Precedent.*

By indenture of the 31st of May, 1852, E. H. demised to the defendant, for ninety-nine years, a piece of land and four unfinished dwelling-houses; and the defendant covenanted, that he would, on or before the 25th of June, 1852, finish the dwelling-houses "under the direction and to the satisfaction of the surveyor of E. H.:" Provided that, if default should be made, it should be lawful for E. H. "into the demised premises, or any part thereof in the name of the whole, and repossess, retain, and enjoy the same as of his former estate." By indenture of the 30th of July, 1852, between E. H. of the one part, and the plaintiff of the other part, after reciting an indenture of lease of the 18th of February, 1852, whereby S. W. demised to E. H. certain land (including the land in question) for ninety-nine years, and that E. H. had made underleases, E. H. assigned to the plaintiff the said leasehold premises, "and all the estate, right, title, and interest of him the said E. H. in, to, or out of the said premises," for the residue of the term of years granted by the aforesaid indenture of lease; subject, nevertheless, to the underleases thereinbefore referred to. The defendant did not complete the houses at the stipulated time; whereupon the plaintiff brought an action of ejectment against him. No surveyor had been appointed:—*Held*, first, that the appointment of a surveyor was a condition precedent to the performance of the defendant's covenant to complete the houses.

Secondly—That a right of entry for condition broken is not assignable under the 8 & 9 Vict. c. 106, s. 6.

Semble—That there was a suffi-

cient power of re-entry; also, that the assignment operated as a waiver of any forfeiture. *Hunt v. Bishop*, 675

CREDITOR.

See BANKRUPT, (3).
COMPOSITION.

CUSTOM, CLAIM OF.

See COUNTY COURT, (2).

DAMAGES.

See OUTLAWRY, (2).
PARTNERSHIP DEED.
PLEADING II., (2).
TITHES.

In an action by three plaintiffs for a breach of contract in not completing certain works, whereby they were prevented from fulfilling a contract made by them with another firm, consisting of two of themselves, the plaintiffs were held entitled to recover as special damage the loss of profit on their contract, although it could not be enforced at law, owing to the community of the parties, and was void by the Statute of Frauds. *Waters v. Towers*, 401

DECLARATION.

See COMMON LAW PROCEDURE ACT, (1).
FRAUD.
FREIGHT.

DEED OF SETTLEMENT.

See JOINT STOCK COMPANY, (1).

DEED.

Non-Execution by Lessor.

Debt upon an indenture, dated the 27th of December, 1849, alleged to have been made between five Commissioners of an inland navigation, under the authority of several Acts of Parliament, on the one part, and

the defendant on the other part, whereby the Commissioners, as was alleged in the declaration, in consideration of the rent therein mentioned, demised the tolls of the said navigation to the defendant for one year, from the 1st of January, 1850, at the rent of 3470*l.*, payable monthly, together with certain other payments, and the defendant covenanted with the Commissioners, parties to the said indenture, and also with the whole body of the Commissioners of the navigation, as a separate covenant, for the due payment of the rent. The declaration then averred an entry by virtue of the demise, and the occupying and receiving the tolls during the entire year. Breach, the non-payment of the rent. Plea, that the Commissioners, the lessors named in the indenture, never executed the lease, and that the entry and occupation was at the will of the Commissioners only, and not under the demise. Replication, that the defendants had entered and had received and enjoyed the tolls, &c., by the permission of the Commissioners, under the terms of the indenture:—*Held*, that, as the lessors had not executed the lease, the lessee had never received the consideration for which he had stipulated, namely, a permanent estate during the demise, and under its terms; and therefore, that he was not liable to be sued upon his covenant in that instrument. *Swatman v. Ambler*, 72

DEL CREDERE COMMISSION.

See INSURANCE, (1).

DEMISE.

See DEED.

Agreement amounting to new Demise.

The defendant, by agreement, de-

mised to the plaintiff certain premises from the 15th of May, 1851, at the yearly rent of 145*l.*, payable on Nov. 14th and May 14th. These premises had been let to W., whose tenancy expired on the 13th of May, 1851, and who had omitted to give a notice to quit to one of his under-tenants, who occupied a cottage at a yearly rent of 5*l.*; and, in consequence, the plaintiff could not obtain possession of that part of the premises. It was then agreed that the defendant should receive from the undertenant rent for two half years, and deduct that 5*l.* from the rent to be paid for the whole by the plaintiff, and that the plaintiff should pay 70*l.* to the defendant on the 14th of November, 1851, and 14th of May, 1852.—*Held*, that such agreement operated as a new demise; and that the defendant was entitled to distrain for 70*l.*, which became due on the 14th of November. *Watson v. Waud*, 335

DETINUE.

See ADMINISTRATOR, (2).
PLEADING II., (2).

DEVIATION.

See WAY.

DEVISE.

See COUNTY COURT, (3).
LEGACY DUTY, (1), (2), (4).
WILL.

DISCHARGE BEFORE BREACH.

See COVENANT.

DISTRESS.

See COMMON LAW PROCEDURE ACT, (6).
COMMISSION OF SEWERS.
LANDLORD AND TENANT, (1).
PLEADING II., (1).
Goods deposited in an open yard

EVIDENCE.

belonging to premises in the occupation of an auctioneer, for the purpose of being sold by public auction, are privileged from distress. *Williams v. Holmes*, 861

EASEMENT.

See PLEADING III., (1).

EJECTMENT.

See COMMON LAW PROCEDURE ACT, (1), (3), (6).

ENDOWMENT.

See TITHES.

ENROLMENT.

See ANNUITY.

ERROR IN FACT.

See OUTLAWRY.

EVIDENCE.

See ADMINISTRATOR, (1).
INSOLVENT, (2).
PLEADING II., (3).
SET-OFF.

(1). *Contradiction of Witness.*

In an action upon a joint and several promissory note professed to be made by A. and B., the defendant being the administrator of A.; the defence set up was, that the plaintiff had forged the note and another note also; and the defendant was asked on cross-examination, whether he had not heard B. say, after the case had been before the magistrates, when a charge of forgery with reference to the note was preferred against the plaintiff, that "he, B., was sorry he had forgotten he had signed two notes." The defendant answered in the negative:—*Held*, that another

witness could not be called to shew that he was present at the time, and that B. had made the statement.
Palmer v. Trower, 247

(2). *Attesting Witness.*

The 14 & 15 Vict. c. 99, s. 2, which renders the parties to a suit competent and compellable to give evidence, has not altered the rule of law which requires a written instrument to be proved by the attesting witness. *Whyman v. Garth*, 803

EXECUTION.

See BOND.

FOREIGN JUDGMENT.

See PLEADING III., (3).

FORFEITURE.

See COVENANT, (2).

FRANCHISE.

See COUNTY COURT, (2).

FRAUD.

Action founded on Fraud.

A declaration stated that the defendants *falsely and fraudulently* deceived the plaintiff in this, that the defendants, as brokers of the plaintiff, employed by him to purchase certain oil, falsely represented to him that they had purchased for him twenty-five tons of palm oil, to arrive by the Celma, at the price of 30*l.* per ton; by reason of which false representation, the plaintiff, believing that the said twenty-five tons of palm oil had been so bought, and would be delivered to him in accordance with the terms aforesaid, entered into certain contracts, &c., whereas the defendants had not purchased the said

quantity of palm oil, or any palm oil, by the Celma, on the terms aforesaid, but on different terms, viz. that the said twenty-five tons were sold and would be delivered to the plaintiff after and subject to the prior delivery of 800 tons of palm oil from the said vessel. The declaration then proceeded to state that, by reason of the vessel not having more than 800 tons of the said palm oil on board, no part of the said twenty-five tons could be delivered to the plaintiff, whereby he was obliged to purchase a like quantity of palm oil at other places at a higher price:—*Held*, that, as the declaration was founded upon deceit, in the absence of fraud, the action could not be sustained.

Quære, whether the law merchant imposes the duty upon the broker of giving a true account of his purchases to his principal in all cases? *Thom v. Bigland*, 725

FREIGHT.

See CHARTERPARTY.

INSURANCE, (4).

SHIP, (1), (5).

Action for Freight—how barred.

It is a good plea to an action for freight, in bar of the further maintenance of the action, that a certain sum of money had been borrowed on a bottomry bond; that the amount had not been paid; and that thereupon, after the commencement of the action, proceedings had been instituted in the Court of Admiralty for the recovery thereof; and that the defendants had, in pursuance of a monition issued out of that Court, paid the freight into the registry of that Court; although the amount of the freight exceeds that due upon the bottomry bond.

A declaration in an action for freight stated, that "the defendants

are indebted to the plaintiff for freight" for the conveyance of goods, &c.:—*Held*, on general demurrer, that the declaration was bad, for not following the form given by the schedule to the Common Law Procedure Act, which contains the words "for money payable by the defendant to the plaintiff," and for not shewing any debt due *in presenti*. *Place v. Potts*, 705

GENERAL ISSUE.

See JOINT-STOCK COMPANY, (2).

GIFT.

See LEGACY DUTY, (1).

GOOD TITLE.

See LANDLORD AND TENANT, (4).

GOVERNESS.

See MASTER AND SERVANT.

GRANT.

See WATER.
WAY.

GRANTOR.

See ANNUITY.

GUARANTEE.

See INSURANCE, (1).

Construction.

The plaintiff and the defendants being members of the committee of a projected Railway Company, by an agreement under seal, which recited that divers debts and liabilities had been incurred, and that it was probable that further disputes would arise respecting the liability of the members and the committee of management; and that the plaintiff, being desirous of being relieved from all such questions and disputes, had pro-

posed to contribute and pay a certain sum to the defendants towards the payment of these claims, upon their agreeing to indemnify him in the manner therein mentioned, and to guarantee him that the sums mentioned in the first schedule to the agreement had been paid: the defendants guaranteed that the sums mentioned in the first schedule had been paid; and also, "that they would indemnify and save harmless the plaintiff from all claims expressly mentioned and referred to in the second schedule, and from all costs, damages, and expenses which he might sustain or be put to by reason thereof, and at their own costs and charges defend him against all actions and suits which should be commenced or prosecuted against him for the recovery thereof or any part or parts thereof." After the making of this agreement, an order was obtained in the Court of Chancery, under the Winding-up Act (11 & 12 Vict. c. 45), for winding up the affairs of the Company. The plaintiff was adjudged to be a contributory; and a certain sum was directed to be collected, such sum being composed of one of the sums mentioned in the second schedule to the agreement, and the rest of it consisting of costs and expenses occasioned by and incidental to the proceedings under the Winding-up Act. The plaintiff, having been ordered to pay a certain proportion of the sum directed to be collected, and having paid the same, brought an action against the defendants under the agreement:—*Held*, that the agreement merely protected the plaintiff against the claims mentioned in the schedules, and against the costs and expenses to which the plaintiff might be put by reason of the enforcement of those claims; and consequently, that the plaintiff was not entitled to recover beyond the amount of the sum men-

HUSBAND AND WIFE.

tioned in the second schedule, and which was included in the amount directed to be collected; and that the costs and expenses which he had been compelled to pay were not of the character contemplated by the agreement, and could not be recovered by him from the defendants. *Tanner v. Woolmer*, 482

HOLDER OF BILL OF EXCHANGE.

See BILL OF EXCHANGE, (2).

HOUSE OF CORRECTION.

See JUSTICE OF THE PEACE.

HUSBAND AND WIFE.

See RAILWAY COMPANY, (1).

(1). *Illegitimate Child.*

The father and mother of an illegitimate child entered into the following agreement: — "Agreement made between L., of &c., and G. single-woman, respecting the maintenance of a certain illegitimate female child. L. agrees to pay 45*l.* to the child as follows:—12*l.* to be paid down, and the remaining 33*l.* in four equal payments in four years; the first of such payments, 8*l.* 5*s.*, to be made on the 30th of December, 1846, and every succeeding 30th December, till the period of four years do expire. But if the child should die before the four years do expire, the payments to cease at such decease." The 12*l.* was paid at the time, and the agreement was placed in the hands of the attesting witness. The mother, having afterwards heard that the father had got possession of the agreement, obtained against him an affiliation order for payment of a weekly sum, which was duly paid.

IMPLIED COVENANT. 941

Subsequently, the mother married, and joined with her husband in an action against the father, one count of the declaration being for necessities supplied to the child by her before her marriage, and another count for necessities supplied by her and her husband after their marriage:—*Held*, that, if the meaning of the agreement was, that the father would make the stipulated payments if the mother would support the child, then the agreement was without consideration; but if the meaning of it was, that the mother would undertake the *sole maintenance* without affiliating the child, in which case there would be a good consideration, then the agreement had not been performed.

Quere—whether the agreement was within the 4th section of the Statute of Frauds. Also, whether the wife could join with her husband for the recovery of necessities supplied to the child after the marriage. *Crowhurst v. Laverack*, 208

(2). *Liability of Husband.*

A husband living with his wife, and who makes her a sufficient allowance for dress, is not liable for dresses supplied to her without his knowledge; and the fact of the wife having, within a particular period, purchased various articles of dress of different tradesmen, is admissible in evidence to rebut the presumption, arising from cohabitation, of an implied authority to contract for necessary clothing. *Reneaux v. Teakle*, 680

ILLEGAL AGREEMENT.

See INSOLVENT, (2).

IMPLIED COVENANT.

See LANDLORD AND TENANT, (4).

INCORPOREAL HEREDITAMENT.

See COUNTY COURT, (2), (4).

INDEMNITY.

See BANKRUPT, (4).

INFANCY.

A plea of infancy, to an action for railway calls, should allege that the infant repudiated the contract within a reasonable time after he became of full age.

Quære, whether the plea ought to allege that the infant repudiated before the calls became due. *The Dublin and Wicklow Railway Company v. Black*, 181

INLAND NAVIGATION ACT, 1 & 2 WILL. 4, c. lxxiii.

See DEED, (1).

INSOLVENT.

(1). *Debt accruing after Vesting Order.*

An insolvent, who has taken the benefit of the 1 & 2 Vict. c. 110, may sue for a debt which accrued to him after the vesting order and before his final discharge, unless the provisional assignee interferes and claims the debt; therefore, a plea of the plaintiff's insolvency is bad, unless it contains an express averment to that effect:—Per *Pollock*, C. B., *Alderson*, B., and *Platt*, B.; *Martin*, B., dubitante. *Jackson v. Burnham*, 173

(2). *Illegal Agreement.*

To an action on a promissory note the defendant pleaded, that, after the passing of the 1 & 2 Vict. c. 110, one H. being indebted to Messrs. H.

and others, and being in actual custody within the walls of Horsemonger-lane Gaol on a judgment at the suit of O., did, within fourteen days after such imprisonment, petition the Insolvent Court for his discharge under that Act; and that, while the petition was pending, and in order to induce Messrs. H. to cease from opposing and not thereafter to oppose his discharge as they had threatened, the defendant and O. made the note in question, and delivered it to Messrs. H., who indorsed it to the plaintiff with notice:—*Held*, on motion for judgment not obstante veredicto, that the agreement set forth in the plea was illegal and void, and the plea good.

Held, also, that the copy of the causes of the insolvent's detention filed with the petition, and sealed with the seal of the Insolvent Court, was not made evidence by the 105th section of the 1 & 2 Vict. c. 110, of the fact alleged in it, that the insolvent was in actual custody within the walls of a prison at the time of his petition. *Hills v. Mitson*, 751

INSURANCE.

See STAMP, (1).

(1). *Construction.*

The plaintiffs, merchants at Smyrna, chartered a vessel to proceed to Salonica, and there having loaded a cargo of Indian corn, to proceed to a safe port in the United Kingdom. The plaintiffs accordingly shipped, at Salonica, 1180 quarters of Indian corn; and on the 22nd of February, 1848, the master signed a bill of lading, making the corn deliverable "to order of the plaintiffs or to their assigns, he or they paying freight as per charterparty." The plaintiffs indorsed the bill of lading, and sent it together with the charter-

party to B., their London agent, with orders to sell the cargo on their account; and they also, through B., insured the cargo "at and from Salonica to the port of discharge in the United Kingdom," &c., "corn warranted free from average unless general, or the ship be stranded." On the 1st of May, 1848, B. employed the defendants, corn-factors in London, to sell the cargo, and sent them the bill of lading indorsed, the charterparty, and policy of insurance; and they advanced 600% on the cargo. The custom of corn-factors is, to sell under a *del credere* commission, and when so selling not to mention the purchaser. On the 15th of May, 1848, the defendants sold the cargo to C., and sent him a bought note, which stated, that he had bought of them "1180 quarters of Salonica Indian corn of *fair average quality when shipped*, at 27s. per quarter, *free on board, and including freight and insurance*, to a safe port in the United Kingdom, payment at two months from this date, upon handing over shipping documents." On the same day the defendants wrote to B., advising him of the sale, but without making any mention of the purchaser or of commission. The vessel sailed from Salonica on the 23rd of February; and having met with tempestuous weather, the cargo became so heated and fermented that the vessel was obliged to put into Tunis Bay, where the cargo, having been surveyed, was found to be unfit to be carried further, and, on the 24th of April, it was sold. On the 23rd of May, C. gave the defendants notice that he repudiated the contract, on the ground that the cargo did not exist at the time of the sale to him. In March, 1849, C. became bankrupt. The plaintiffs brought the present action against the defendants to recover the price of the car-

go, and declared specially on a *del credere* guarantie:—*Held*, first, that the true meaning of the contract (which could not be explained by evidence of mercantile usage) was, that the purchaser bought the cargo, if it existed at the date of the contract; but that, if it had been damaged or lost, he bought the benefit of the insurance; and therefore he was bound to pay the stipulated price in a reasonable time after the bill of lading and other shipping documents were handed over to him—*Pollock, C. B.*, dissentiente.

Secondly, that the defendants were responsible by reason of their *del credere* commission, although there was no guarantie in writing signed by them, since this was not an undertaking to pay the debt of another within the 4th section of the Statute of Frauds.

Thirdly, that the plaintiffs were entitled to judgment non obstante veredicto on a plea which stated, that, at the time the defendants were employed to sell the corn, it was heated and fermented, and had been unloaded and sold; that the defendants and C. were ignorant of the premises; and that C., in a reasonable time after the sale, and before the time of payment, repudiated the contract. *Couturier v. Hastie*, 40

(2). *Misrepresentation.*

To an action on a policy of insurance, a plea, that the insurer was induced to enter into the policy by a false misrepresentation of a material fact, made by the assured and their agent, such misrepresentation being, at the time it was made, false to the knowledge of the insured and their agent, is supported by proof, either of concealment or of misrepresentation not fraudulent.

Semble, that, upon taxation, the de-

fendant would not be entitled to such costs as had reference to the proof of fraud.

Where a policy is avoided by concealment or by misrepresentation not fraudulent, the assured is entitled to a return of the premium, and the policy is conclusive evidence of the receipt of the premium by the insurer. *Anderson v. Thornton*, 425

(3). *Reference to Arbitration.*

The plaintiff and the defendant were members of an Insurance Association, and by one of the rules of that Society it was provided (inter alia) that the sum to be paid by the Association to any suffering member for any loss or damage should, in the first instance, be ascertained and settled by the committee; and the suffering member, if he agreed to accept such sum in full satisfaction of his claim, should be entitled to demand and sue for the same as soon as the amount to be paid has been ascertained and settled, but not before, which could only be claimed according to the customary mode of payment in use by the Society; and if a difference should arise between the committee and any suffering member relative to the settling of any loss or damage, or to a claim for average, or any other matter relating to the insurance, that arbitrators should be selected out of certain persons named in the rule, and that they should settle the claims and matters in dispute according to the rules and customs of the club. The rule also provided, that no member, who refused to accept the amount of any loss as settled by the committee in manner specified in full satisfaction of such loss, should be entitled to maintain any action at law or suit in equity on his policy, until the matters in dispute should have been referred to and decided by

arbitrators appointed as therein specified, and then only for such sum as the arbitrators should award; and that the obtaining the decision of such arbitrators on the matters and claim in dispute was thereby declared to be a condition precedent to the right of any member to maintain any such action or suit. The plaintiff effected an insurance upon a ship in which he was interested with the Association, and by the policy it was expressly stated that all rules and regulations of the Association should be binding upon the assured and assurers as effectively as if such rules were inserted in the policy.

To an action by the plaintiff against the defendant, as one of the underwriters, to recover from him compensation for the loss of the vessel, which loss took place during the period covered by the policy, the defendant pleaded, setting out the above rule of the Association, and alleging that, before action brought, the committee ascertained and settled the sum to be paid to the plaintiff for the loss; that the plaintiff was dissatisfied with the settlement; and that the defendant and the committee had always been ready and willing to refer the said matters in difference relating to the said insurance to arbitration, and to have the loss ascertained and settled by arbitrators according to the intention of the said rule; but that the plaintiff was not ready and willing to do so; and that the said loss had not been so settled:—*Held*, in the Exchequer, that the rule relied upon was void, as an attempt to oust the superior Courts of their jurisdiction; and therefore that the plea was bad.

Held, also, that a similar plea, setting out the rule, and stating that the committee proceeded to ascertain the loss, but that a dispute having arisen between the plaintiff and the committee relating to the insurance, the

loss had never been fixed by them, although they and the defendant had always been ready and willing to refer the matters relating to the insurance to arbitration, but that the plaintiff would not, and that the loss had never been so ascertained, was bad for the same reason.

Held, in the Exchequer Chamber, reversing the judgment of the Court of Exchequer, that although an agreement which ousts the superior Courts of their jurisdiction is illegal and void, yet the above contract was not of that description, since it did not deprive the plaintiff of his right to sue, but only rendered it a condition precedent that the amount to be recovered should be first ascertained, either by the committee or by arbitrators. *Scott v. Avery, Avery v. Scott*, 487

(4). *Insurance on Freight.*

In February, 1847, the plaintiffs chartered a vessel at Monte Video to proceed to the Falkland Islands, and thence to Santa Cruz, and there load a cargo of guano, and discharge it at a port in Europe, freight to be paid at the rate of 250*l.* per month, and one month's pay to be paid when the vessel sailed from the Falkland Islands, and the balance on the delivery of the cargo at the port of discharge. The vessel sailed from Monte Video, and arrived at the Falkland Islands with a cargo, which was there safely delivered. While there, the plaintiffs paid the captain 250*l.* for one month's pay, as agreed by the charterparty. The vessel then proceeded to Santa Cruz, and loaded some guano, with which she returned to Monte Video, where she completed her cargo by taking in a quantity of hides. In October, 1847, whilst the vessel was at Monte Video, the plaintiffs entered into a new charterparty, by which the vessel was to proceed with

the cargo then on board to Havre, freight to be paid at the rate of 250*l.* per month, the time to commence from the 26th of March last: freight to be paid at the port of discharge, after deduction of 250*l.*, which it was stated the captain received on account of that charterparty. In December, 1847, the agent of the plaintiffs, by their direction, effected with the defendant a policy of insurance, "lost or not lost from Monte Video to Havre on 450*l.* freight advanced." The vessel and cargo were totally lost on the voyage from Monte Video to Havre:—*Held*, in the Exchequer Chamber, first, that the plaintiffs had an insurable interest, and were entitled to recover on the policy the 250*l.* as freight advanced, since that was not a separate sum due on the arrival of the vessel at the Falkland Islands, but a portion of the entire amount payable for the whole voyage; and, as the parties, by entering into the second charterparty, had annulled the first, and had agreed to treat the 250*l.* as paid under the second charterparty, that sum still remained at risk.

Secondly, that there was no misdescription of the plaintiffs' interest in the policy. *Ellis v. Lafone*, 546

(5). *Perils insured against.*

To a declaration on a policy of assurance on advances for the transport of Chinese emigrants from China to Peru, for their outfit and provisions, to be paid on the arrival of the emigrants at the port of destination, the perils insured against being "pirates, rovers, thieves, &c., barratry of the master and mariners, and all other perils, losses, and misfortunes," &c. (in the usual form); the declaration alleging a total loss by the emigrants piratically and feloniously murdering the captain and part of the crew, and feloniously stealing and carrying away

the ship;—the defendants pleaded, first, that as soon as the emigrants had committed the murder, and had obtained possession of the vessel, they steered for the nearest land, for the purpose of being landed, and refused to and could not proceed upon the voyage, and the vessel was then fit and able safely to proceed to the said port; and the remainder of her crew could have navigated her there, and were ready and willing to convey the emigrants there if they would have gone, but that they would not; and that, by reason of that refusal and for no other cause whatever, the transport was never completed.

Secondly, as to the taking and carrying away of the vessel, that the emigrants were unwilling to be carried on the said voyage, and that they committed the murder, and took possession of the vessel for the purpose of being landed, and of escaping, and from being carried on the voyage, and for no other purpose, which is the said piratical carrying away of the vessel.

Held, that the pleas were bad.

Semble, that the second plea might have been successfully objected to by application to a Judge at Chambers, on the ground of its being ambiguous whether the plea was intended as an argumentative denial that the murder and carrying away of the vessel was one of the perils insured against, or whether it was intended to deny that the loss was occasioned by that peril.

Naylor v. Palmer, 739

(6). *Against Fire.*

The plaintiff effected an insurance against fire on his stock, by a policy which contained the following (among other) conditions:—"That if, in the building insured or containing any property insured, shall be used any steam-engine, stove, &c., or any de-

scription of fire-heat other than common fire-places, or any process of fire-heat be carried on therein, the same must be noticed and allowed on the policy; and if any omission or misrepresentation take place, the policy is void. In case of any circumstance happening after an insurance has been effected, whereby the risk shall in any way be increased, the insured is required to give notice thereof to the Company, and the same must be allowed by indorsement on the policy, otherwise the policy is void. In case of any alteration being made in a building insured, or containing any property insured, or of any steam, steam-engine, stove, &c., or any other description of fire-heat being introduced, notice thereof must be given, and every such alteration must be allowed by indorsement on the policy, and any further premium which the alteration may occasion must be paid; and unless such notice be given, such premium paid, and such indorsement made, no benefit will arise to the insured in case of loss." The plaintiff, who was a cabinet-maker, erected on his premises a brick furnace or boiler, to which he attached a small steam-engine, for the purpose of trying whether it was worth his while to buy the engine to use in his business. On one occasion a fire was lighted and the engine set to work, when it was found to be wholly unfit for the purpose for which the plaintiff required it. A few days afterwards a fire broke out on the plaintiff's premises, by which his stock was consumed. No notice was given to the Company:—*Held*, that the plaintiff could not recover on the policy, since the terms of the conditions applied to the introduction of a steam-engine in a heated state at any time, without notice to the Company; and that it made no difference whether it was used by way of experiment or as an

approved mode of carrying on the business, or whether it was used for a longer or a shorter time. *Glen v. Lewis*, 607

(7). *Condition Precedent to right to recover for Loss.*

By a condition indorsed on a policy of insurance, it was stipulated that, in case of fire, the assured should, within three months, deliver to the secretary of the Company full particulars of the loss sustained:—*Held*, that the delivery of particulars was a condition precedent to the right of the assured to recover for the loss. *Mason v. Harvey*, 819

INTEREST.

See SHIP, (4).

JEW.

See OATH.

JOINT-STOCK COMPANY.

(1). “Shareholders” and “Subscribers.”

The defendant obtained an allotment of shares in a Joint-stock Company, completely registered under the 8 & 9 Vict. c. 110, the capital of which was to consist of 500,000*l.* in 50,000 shares. He paid the deposit, and his name was inserted in the register of shareholders, but he never executed the deed of settlement. The proposed amount of capital was never subscribed, but the Company commenced business with less; and having become embarrassed, an Act of Parliament (11 & 12 Vict. c. ciii.) passed for winding-up the affairs of the Company. This Act, after reciting the deed of settlement, and that certain shares were unpaid, empowered the directors to sue for

calls, and enacted that, in such actions, the register should be *prima facie* evidence of the defendant being a shareholder, and of the number of his shares, provided that such calls should be made according to the provisions of the deed of settlement, and, as regarded the liability of shareholders, should be deemed to have been made under such provisions; and also provided that nothing in that Act contained, except as therein expressly enacted, should render liable to calls any shareholder or other person who would not have been liable thereto if that Act had not passed. The defendant having been sued for calls:—*Held*, first, that the private Act applied to *shareholders* only, and that the defendant was not liable as a shareholder, inasmuch as he had never executed the deed of settlement. Secondly, that even if the Act included *subscribers*, the defendant was not liable, for his contract was conditional upon the full amount of capital being raised, and that condition had not been performed or waived—*Martin, B.*, *dubitante*. *The Galvanized Iron Company v. Westoby*, 17

(2). *Illegal Contract.*

The 23rd section of the Joint-stock Companies Registration Act, 7 & 8 Vict. c. 110, by which it is lawful for the promoters of a Company (being a Joint-stock Company within the meaning of the Act), upon being provisionally registered, to assume the name of the intended Company, to open subscription lists, &c., absolutely prohibits the promoters from making calls, from purchasing, contracting for, or holding land, or from entering into contracts for any services, or for the execution of any works, &c., except such services, &c., are necessarily required for the establishing of the

Company, and except the contract or purchase be made conditional on the completion of the Company, and to take effect after the certificate of complete registration, &c.; and such contracts so prohibited are illegal, and a defence founded upon this section must be specially pleaded. *Bull v. Chapman*, 444

JUDGMENT.

See COMMON LAW PROCEDURE ACT, (8).

JUDGMENT AGAINST CA-SUAL EJECTOR.

See COMMON LAW PROCEDURE ACT, (1).

JUDGMENT AS IN CASE OF NONSUIT.

See COMMON LAW PROCEDURE ACT, (2).

JURY.

See COMMISSION OF SEWERS.

JUSTICE OF THE PEACE.

The plaintiff, a resident inhabitant of the parish of W. in the county of Hertford, was summoned to appear at the Shire Hall of the county before the defendants, who were appointed justices of the county under a commission; which gave them authority to act as such as well within the liberty of St. Alban as without, to answer a charge of assault committed by him within the liberty. The plaintiff, not having appeared to the summons, was convicted in a penalty with costs, under the 9 Geo. 4, c. 31; and the same not having been paid, he was committed by the defendants to the liberty house of correction. By a charter of Edward 4, the king granted to the abbots of St. Alban the right to appoint their own justices of the peace within the liberty; and the charter contained a non-intromittant clause prohibiting all other justices

from in any way interfering with the justices so appointed. By the stat. 27 Hen. 8, c. 24, s. 2, the power of all grants of liberties to make justices was put an end to; and it was thereby enacted, that, for the future, all such justices should be made by letters patent under the Great Seal. The 17th section of that Act provided that all justices of the peace thereafter to be made by the Crown should sit and hold their sessions in the same places as the justices of the liberties commonly used; and that no person or persons within the said liberties, or any of them, should thereafter in any wise be compelled by authority of that Act to appear out of the said liberties before any other justices of assize, gaol delivery, or of the peace, than before such justices as should be named and assigned to sit and be by the king within the said liberties, &c. By the 31 Hen. 8, c. 13, An Act for Dissolution of Monasteries and Abbeyes, it was enacted, that all monasteries and abbeyes, and also the courts, liberties, and privileges belonging to the same, should be vested in the king. By the 32 Hen. 8, c. 20, after reciting that the liberties, &c., of divers monasteries had been assigned to the king's Court of Augmentations, and that it had not been fully declared in what wise the liberties, privileges, and franchises which the late owners of the same sites had used and exercised, should be used and exercised, it was enacted that such liberties, privileges, &c., which the late owners had used and exercised three months next before the said sites, &c., came to the king, should be revived in the king, and that the same liberties, &c., should be used and exercised by such stewards, &c., or other officers, as the king might appoint, in like manner as they were lawfully exercised by the ministers before they came to the

hands of the king. By charter of 9 Jac. 1, the king granted to G. W. and T. W. all that our liberty to the late monastery of St. Alban, with all and singular its rights, &c., in so ample a manner and form as any abbot, &c., of any late abbey ever had held, used, or enjoyed. The premises contained in the said charter descended to the present Marquis of S. By the 27 Geo. 3, c. 11, it is provided, that it shall be lawful for any justice or justices of the peace, within his or their respective jurisdictions, to commit either to the common gaol or to any house of correction within his or their respective jurisdictions, as to such justice or justices shall seem most proper, such vagrants and other criminals, offenders, and persons charged with or convicted of small offences, as by any law now in force or hereafter to be made, he or they is or are or shall be authorised to commit to the common gaol:—*Held*, that the justices for the liberty had not exclusive jurisdiction within the liberty; and that, therefore, the defendants, who were appointed justices for the county under the commission which gave them authority to act as such within the liberty as well as without, had jurisdiction over the offence with which the plaintiff was charged, though committed within the liberty.

Held, also, that, as the liberty house of correction was locally situate within the defendants' jurisdiction, they were empowered to commit the plaintiff to it. *Arnold v. Gausson*, 463

LANDLORD AND TENANT.

See COUNTY COURT, (4), (6).

DEMISE.

DISTRESS.

(1). *Abandonment of Distress.*

Half-a-year's rent being due and

in arrear from a tenant who had previously committed an act of bankruptcy, the landlord put in a distress, and was about to proceed with the sale of the goods seized, when, in consequence of a notice from a creditor of the tenant, stating that he was taking proceedings in bankruptcy against the tenant, and that he thereby warned the landlord not to sell, and threatened to hold him accountable if he did, the landlord withdrew the distress without obtaining payment of his rent. At that time no assignee had been appointed; but the tenant was afterwards declared bankrupt, and the creditor who gave the above notice was made assignee. The landlord subsequently distrained a second time for the same rent; but the goods were sold under the direction of the assignee, and the proceeds of the sale were paid over to him:—*Held*, that, as the landlord had abandoned the first distress without any sufficient excuse for so doing, the second distress was illegal; and that he could not maintain an action against the assignee to recover the proceeds of the goods. *Bagge, App.; Mawby, Resp.*

641

(2). *Payment of Rent.*

It is no answer to an action on a covenant for rent (no particular place for payment being mentioned in the deed) that the defendant was on the premises demised for half an hour before, and continued there to, the setting of the sun, being a sufficient time before sunset to allow of the counting of the money for the rent; and that he was, during that time, ready and willing to pay the rent, if the plaintiff had been minded to take and accept it, but that neither the plaintiff nor any person on his behalf came to receive it; and that from thence hitherto the defendant

has been and is ready and willing to pay the same—concluding by payment of the amount into Court.
Haldane v. Johnson, 689

(3). *Tenancy at Will.*

In 1824, J. W. H., the tenant of certain copyhold premises, demised them for twenty-one years, from Christmas, 1823; and the lease contained a covenant for further renewal. In January, 1847, the devisees of J. W. H., who had been admitted tenants as such by the lord of the manor, demised the premises to one M., who had previously purchased the lessee's interest under the lease of 1824. In May, 1847, M. demised the premises to one Quested, and, in July, 1847, Quested mortgaged the premises to the defendant. By this deed Quested, in consideration of the sum of 400*l.* advanced by the defendant, granted, bargained, sold, and demised the premises to him for the residue of the term wanting one day, and also the benefit of the covenant for further renewal. The deed contained a proviso for redemption in case Quested should pay 10*l.*, being one half-year's interest, on the 29th of January, 1848, and 410*l.*, the principal sum and interest, on the 29th of July, 1848. The deed contained covenants for the payment of principal and interest; and it also provided, that Quested should remain in possession until default in payment, with a power to sell the premises; and the proceeds of such sale were to go first in satisfaction of the principal and interest, and the surplus, if any, to Quested. And it was further agreed, that Quested should hold the premises as tenant at will to the defendant, at the clear yearly rent of 150*l.*, payable quarterly, for which rent it should be lawful for the defendant to distrain; but that the defendant might at any time de-

termine the tenancy, by leaving a written notice on the premises, and that the defendant should apply the rent, when received, in satisfaction of the principal and interest, and should pay the surplus, if any, to Quested. During the continuance of this lease, Quested assigned his interest in the premises to one Sandell, who took possession, and placed a board over the door with "Sandell late Quested" upon it. The plaintiff's goods, which were on the premises, were seized as a distress for three quarters of a year's rent due from Quested to the defendant:—*Held*, in an action for the seizure of the goods, first, that the proof of the devisees of J. W. H., admitted tenants as such by the lord of the manor, being in possession at the time they granted the lease, and of M., the lessee, holding under them, was *prima facie* evidence of their title.

Secondly, that the clause in the deed of mortgage, professing to create a tenancy, was operative, as not being inconsistent with the main object of the instrument, and that a tenancy at will was thereby created.

And thirdly, that the subdemise by the tenant at will, without notice thereof to his landlord, was not a determination of the will. *Pinhorn v. Souster*, 763

(4). *Covenant for quiet Enjoyment and good Title.*

A covenant for quiet enjoyment during the term is implied by law from a demise by parol; but not a covenant for good title. *Bandy v. Cartwright*, 913

LEASE.

See MINE.

RAILWAY COMPANY, (5).

LEGACY DUTY.

(1). *Gift.*

A testator, by will, directed a settlement of his estates to be executed, containing a power for the tenant for life, by deed or will, to charge the estates with an annuity for the benefit of his wife. The donee, by his will, in execution of that power, charged the estates with the payment of the annual sum of 2000*l.* to his wife during her life, *in lieu, bar, and satisfaction of her dower*, which she accepted:—*Held*, in the Exchequer Chamber, affirming the judgment of the Court of Exchequer, that this annuity was “a gift,” subject to legacy duty under the 45 Geo. 3, c. 28, s. 4, and not a purchase for a valuable consideration. *Lord Hen- niker v. The Attorney-General*, 257

(2). *Order by Court of Chancery of Sale of Real Estate.*

A testator devised to trustees his real estates, upon trust to raise a sufficient sum to pay debts and legacies, and upon further trust to pay his two daughters annuities of 300*l.* each; and he directed that, subject to those trusts, the trustees should stand seised of the real estates, in trust for his brother for life, and, after his decease, in trust for his children: provided that it should be lawful for the trustees, with the consent of the testator's brother during his life, and after his decease with the consent of the persons beneficially entitled, to sell the whole or any part of the real estate, and out of the purchase-money invest so much as would be sufficient to pay the annuities of 300*l.* The testator died leaving his two daughters, his brother, and seven children of his brother, surviving. The trustees sold a part of the real estate, and paid the

debts and legacies, when it was found that the rents of the residue of the real estate were not sufficient to pay the annuities, whereupon a bill in Chancery was filed by the testator's brother and his children against the trustees and the testator's daughter; and in pursuance of an order of the Court, the residue of the real estates was sold, and 20,000*l.*, part of the purchase-money, invested, and the interest thereof applied in payment of the annuities. The testator's daughters and brother having afterwards died, the brother's children became entitled to the 20,000*l.*, when the Crown claimed legacy duty on that sum:—*Held*, that, if the Court of Chancery acted on their general power of ordering the sale of real estate to satisfy charges, legacy-duty was not payable; but if the Court acted on the clause in the will, and, in consequence of the will containing that clause, compelled the trustees to execute the power, legacy-duty was payable, inasmuch as, in that case, the sale of the real estate was substantially by the direction of the testator himself. *Hobson v. Neale*, 368

(3). *Payment of Mortgage Debts.*

T., being seised in fee of certain lands, by indenture mortgaged them as a security for money lent. The indenture contained a covenant by T. to pay the principal and interest on a certain day. By another indenture, T. covenanted to pay on a certain day a further sum of money lent, and that the same lands should be charged with that sum also. T., by will, devised his real estate to B., whom he appointed his executor. T. paid the interest on the mortgage debts, but died without having paid the principal. The personal estate of T. was only sufficient to discharge his funeral and testamentary expenses. B., by will,

bequeathed his real and personal estate to his two sons, whom he appointed his executors, and died without having paid the mortgage debts. The executors of B. exhausted his personalty by paying with it those debts, and on that ground claimed an exemption from legacy duty and a return of probate duty:—*Held*, that the executors were bound to pay legacy duty, and were not entitled to a return of probate duty, since they were not justified in paying the mortgage debts with the personal estate of B., notwithstanding the 11 Geo. 4 & 1 Will. 4, c. 47, s. 3, rendered them and B. liable, as devisees, to actions on the covenants in the deeds. *In re Taylor's Estate*, 384

(4). *Real Estate.*

A testator devised to trustees his real estate in Westmoreland, upon trust, out of the rents, to pay M. an annuity of 50*l.*, and upon further trust, to pay to his grandson the rents for his life, and, after his decease, upon trust for his children; and in default of such issue, the testator gave all his estates to his nephews, their heirs and assigns, for ever, subject to the said annuity: Provided, that it should be lawful for the trustees, if thought beneficial to do so, to sell his real estate in Westmoreland; and the testator directed that the purchase-moneys should be invested by the trustees in the purchase or on mortgage of other lands in the counties of Somerset or Devon, which lands should be settled to the same uses; and until the money arising from such sale should be so invested, the trustees should place it in the public funds, or on government or real securities in England. The testator died, leaving his grandson, then an infant, and his nephews him surviving. The trustees filed a bill in Chancery to establish

the trusts of the will, and take the usual accounts, and a decree was made accordingly. The Master, by his report, found that there were no debts due from the testator. Subsequently, the trustees presented a petition in the cause, stating that they were desirous that the estate in Westmoreland should be sold, and the proceeds laid out in the purchase of other lands as directed by the will, and praying that it might be referred to the Master to inquire whether it would be for the benefit of the infant grandson that the estate should be sold. An order having been made, the Master by his report found that it would be beneficial to sell the estate; and, in pursuance of an order of the Court, it was sold, and the proceeds laid out in the purchase of Bank Annuities. The grandson afterwards died without issue, and the interest of the nephews expectant on his decease vested in M. By a decree in the cause, legacies and costs were ordered to be paid, and the residue of the Bank Annuities transferred to M.:—*Held*, that the fund was not subject to legacy duty, since the person entitled to it did not take it as personalty under the will, but in consequence of his election to receive a gift of real estate in the shape of money. *Mules v. Jennings*, 830

LIBEL.

See OUTLAWRY, (2).

LIEN.

See SHIP, (1).

LIGHTS.

See ADMIRALTY, (2).

LOAN SOCIETY.

By the rules of a money loan society it was provided, that each holder of shares should pay a certain sum per

week upon each share, and that each member should take his share by sale, or, for want of a purchaser, by ballot; that for each share he was to receive the sum of 40*l.* when paid by the members, upon giving a security, to be approved of by the committee. A. purchased a 40*l.* share, and by way of the security required, he gave, with two parties, a joint promissory note payable on demand, for 40*l.*, to the treasurer of the society. He continued the weekly payments regularly for some time, and others were made by his sureties, and then default was made:—*Held*, in an action upon the note, in default of payment of the weekly sums, that the preceding payments of the weekly sums were no evidence in support of a plea of part payment of the note. *Jones v. Gretton*. 773

LOCAL ACTION.

The venue in the margin of a declaration was "London," and the first count stated that the plaintiff was possessed of certain premises, situate at Milton, in the county of Kent, abutting on the north on a public navigable river, to wit, the river Thames, on the east upon another part of the said river called the Blockhouse Dock, in which premises the plaintiff and the previous occupiers had carried on the trade of mast and block-makers for sixty years; and the plaintiff, as such occupier, ought to have the free use and navigation of the river, and of the part thereof called Blockhouse Dock, for the more convenient carrying on his said trade, and with boats, rafts, and timber to pass from the stream of the river to the side of the premises abutting on the Blockhouse Dock, either at high or low water, and also to pass from the said premises and the Blockhouse Dock either at high or low water into

the stream of the river, and to load and unload their boats, barges, and other vessels at the side of the said premises: yet the defendant wrongfully placed upon the soil of the said river, and upon the soil of that part thereof called the Blockhouse Dock, divers piles, posts, and great quantities of earth, and therewith formed an embankment, and obstructed the navigation of the river, and prevented the plaintiff having access from the stream of the river to the side of his premises, whereby the plaintiff sustained special damage. The second count was in trover for goods and chattels. The defendant pleaded to the whole declaration, not guilty; and to the second count, that the defendant was possessed of a close, and, at the time of the alleged conversion, was digging upon it a sawpit, and because the goods and chattels in the second count mentioned were without the leave and license of the defendant placed on the close by the plaintiff, and "were then so buried in the close, and so embedded in the earth and soil thereof," that, without a little cutting the same, the defendant could not dig the sawpit, the defendant, in such digging, necessarily and unavoidably a little cut the said goods and chattels. Replication, *de injuriâ*. At the trial, it appeared that the premises were situate, and the obstruction took place, in the county of Kent. The evidence in support of the second count was, that some timber of the plaintiff's being on the close of the defendant, he removed it, and it having been again placed there, and become embedded in the soil, he directed his workmen to dig a sawpit at the place where the timber was, and in digging the pit the timber was cut through, and part remained embedded in the soil, and other part was washed away by the river. The Judge directed the jury to consider whether the defend-

ant really and bonâ fide intended to make a sawpit, or was merely digging a hole for the purpose of cutting the timber:—*Held*, first, that, whether the cause of action in the first count was local in its nature or not, the defendant was not entitled to a verdict on that count, since the declaration contained no allegation which rendered it necessary for the plaintiff to prove that the obstruction took place in the city of London.

Secondly, that the first count was good on motion in arrest of judgment, since it described a private and peculiar damage to the plaintiff from the obstruction of the river.

Thirdly, that there was no sufficient evidence of a conversion.

Fourthly, that the Judge misdirected the jury, in telling them to consider with what *motive* the defendant dug the sawpit.

Seemle, that the cause of action in the first count was local in its nature.
Simmons v. Lillystone, 431

LUGGAGE

See RAILWAY COMPANY, (1).

MARRIAGE SETTLEMENT.

By a settlement made in 1810 by lease and release on the marriage of Henry K. and Mary R., certain landed estates, then limited to one F. R. for life, with remainder in fee to the said Mary R., were settled to the use of Henry K. for life, remainder to the use of Mary R. his intended wife in like manner, with remainder to the use of all or any of the children of the marriage, with such limitations or remainders over as Henry K. and Mary K. his wife should from time to time, by any deed or deeds, writing or writings, with or without power of revocation and new appointment, direct, limit, or appoint; and in de-

fault of such joint direction, limitation, or appointment, or in case any such should be made which should not be a complete disposition of the said hereditaments thereby settled, then, as the survivor of them the said Henry K. and Mary K. his wife by deed or by will should direct, limit, and appoint; and in default of such appointment, joint or several, to certain uses which would give a title to the eldest son. There were two sons of this marriage; and by a deed, dated 1832, Henry K. and Mary K., in exercise of the joint power, appointed the hereditaments, subject to their own life estates, to their youngest son (the defendant) in fee, subject to a power for them jointly by deed to revoke such appointment, and by the same or any other deed, to be by them jointly executed, to limit or appoint any other uses in favour of their children which might be warranted by the several powers contained in the settlement of 1810. By a deed of the 4th of February, 1833, Henry K. and Mary K. jointly revoked the uses contained in the deed of 1832, but made no new appointment. On the 19th of February, 1833, Mary K. died; and in the following month of May, Henry K., by will, did, in execution of the powers vested in him, direct, limit, and appoint the hereditaments to the defendant in fee.

Held, that the effect of the revocation of the joint appointment was to restore the uses of the original settlement, including the joint and several powers of appointment, and consequently that the appointment by the will of Henry K. was a valid exercise of the power by the survivor, and that the defendant was entitled to the property. *Montagu v. Kater*, 507

MASTER OF SHIP.

See SHIP, (3).

MASTER AND SERVANT.

Menial Servant.

A governess engaged at a yearly salary is not within the rule relating to domestic or menial servants, by which the contract of service may be dissolved upon a month's warning or a month's wages. *Todd v. Kerrich*, 151

MEASURES.

See WEIGHTS AND MEASURES.

MEMORANDA, pp. 267, 606.

MERCANTILE CONTRACT
AND USAGE.

See INSURANCE, (1).

MERCHANDISE.

See RAILWAY COMPANY, (1).

MINE.

Construction of Mining Lease.

By indenture, a certain coal mine was demised to the defendants, with liberty to make such outstrokes, drifts, and other communications, through a barrier, covenanted to be left unworked, of the demised mine and any adjoining coal mine, as should be necessary for bringing coal from such adjoining mine into the demised mine, and by such outstrokes &c., to convey under-ground, from such adjoining mine into the demised mine, and from thence to convey away, such coal, and also to draw to bank at any of the pits sunk or to be sunk in the demised lands. The defendants covenanted, that they would not do or suffer to be done anything in working the demised mine, whereby the same should be damnified, drowned, or overburthened with water or styth, or which might occasion any

creep or thrust upon the workings, shafts, aircourses, or watercourses of such colliery, and would keep the levels, drifts, and necessary staples for air clear and in good repair, order, and condition from the surface of the earth down to the levels or drifts, and would draw all the water to come forth out of the colliery by engines to the surface of the earth; and also would, in working the demised mine, leave unwrought a barrier of coal of a certain breadth, and not open any communication between the demised and any adjoining mine, the coals of which should not be won by the lessees by virtue of the liberties aforesaid, or make any outstroke, drift, or watercourse into the same, except by virtue of those liberties: also that the lessees would, once a month, draw to bank at some of the pits or shafts of the demised coal mine (provided that the same should be pits or shafts from which the coals of the thereby demised colliery should not be worked by an outstroke) and lay in some convenient place upon the lands of the lessors all the manure, compost, and dung to be made and bred by the horses employed in working the demised mine, and would spend and bestow so much thereof as might be necessary for that purpose, in dressing and manuring any lands which the lessees might occupy as tenants to the lessors. The lease contained various clauses which spoke of pits or shafts to be sunk on the demised lands, but there was no express covenant to make any such pit or shaft:—

Held, in the Exchequer Chamber, on a bill of exceptions to the ruling of the Judge at Nisi Prius, that the liberty authorised the lessees to break through the barrier for winning coal, as well of the demised mine as of the adjoining mines in their occupation, though the coal of such demised or adjoining mines, when won, was not

to be nor was brought to the surface through a pit or shaft in the land of the lessors above the demised mine, and although no such pit or shaft in fact existed.

Held, also, in the Exchequer Chamber, affirming the judgment of the Court of Exchequer, that no covenant could be implied binding the lessees, upon the demised mine being worked and manure bred therein, to sink a pit or shaft on the demised land.

Seem, that the suffering a seam of the mine, where workings had been formerly carried on but were discontinued, to be filled with water, whereby the aircourses in that seam were interrupted, was not a breach of the covenant to keep the levels, drifts, and necessary staples for air in good repair, order, and condition. *James v. Cochrane*, 556

MISREPRESENTATION.

See INSURANCE, (2).

MONEY HAD & RECEIVED.

See DEED.

SHIP, (1), (5).

Illegal Demand.

The plaintiff applied to the defendant, a parish clerk, for liberty to search the register-book of burials and baptisms. He told the defendant that he did not want certificates, but only to make extracts. The defendant said that the charge would be the same whether he made extracts or had certificates. The plaintiff searched through four years, and made twenty-five extracts, for which the defendant charged him 3*s.* 6*d.* each; and he accordingly paid the defendant 4*l.* 7*s.* 6*d.*:—*Held*, first, that the charge for extracts was illegal, since the 6 & 7 Will. 4, c. 86, s. 35, only authorises a charge for a

search, and for a certified copy; secondly, that the payment was not voluntary, so as to preclude the plaintiff from recovering back the excess; and thirdly, that the defendant was the proper person to be sued.

Per Platt, B., and Martin, B., when money is paid under an illegal demand, *colore officii*, the payment can never be voluntary. *Siecle v. Williams*, 625

MONTH'S WARNING.

See MASTER AND SERVANT.

MORTGAGE

See BANKRUPT, (2).

LANDLORD AND TENANT, (3).

MORTGAGE OF SHIP.

See SHIP, (1), (4).

MORTGAGEE

See RAILWAY COMPANY, (2).

MUNICIPAL CORPORATION ACT.

All the overseers, whether churchwardens or not, must sign the "Burgess List," required by the 15th section of the Municipal Corporation Act, 5 & 6 Will. 4, c. 76.

A declaration for a penalty under the 48th section of that Act stated, that the defendant was an overseer, and that it was his duty, as such overseer, to make out and sign a list of all persons entitled to be on the burgess roll, and that he unlawfully neglected so to do:—*Held*, that, after verdict, the declaration was good, although it did not aver that there were any persons entitled to have their names on the list. Whether the declaration would have been good

on special demurrer—*Quære. Clarke v. Gant*, 252

MUTUAL DEBTS.

See STATUTE OF SET-OFF.

NEGLIGENCE.

See ADMIRALTY, (2).

NEW ASSIGNMENT.

See PLEADING III., (2).

NOT POSSESSED.

See BANKRUPT, (6).

NOTICE OF ACTION.

See PUBLIC HEALTH ACT.

OATH.

Held, in the Exchequer Chamber, affirming the judgment of the Court of Exchequer—first, that, though the form of the oath of abjuration required by the 6 Geo. 3, c. 53, mentions the name of "King George" only, it is not confined to sovereigns of that name, but the name is merely used by way of describing the existing sovereign, and therefore the form must be altered from time to time by the substitution of the name of the sovereign reigning at the time when the oath is taken; secondly, that the words of the oath "upon the true faith of a Christian," are a substantive part of the oath itself, and not merely part of the ceremony for administering it. Therefore, a person of the Jewish persuasion, who is elected a member of the House of Commons, and takes his seat as such after having taken the oath in the form binding on his conscience, but intentionally omitting the words "upon the true faith of a Christian," is liable to the penalties imposed by the 1 Geo. 1, st. 2, c. 15, s. 17, (and

not repealed by 15 & 16 Vict. c. 43), on any person sitting in parliament without having first taken the oath of abjuration. *Salomons v. Miller*, 778

ORDER OF COURT OF BANKRUPTCY.

See BANKRUPT, (6).

OUTLAWRY.

(1). *Error in Fact*.

The Court will, on motion, reverse an outlawry on mesne process for error in fact, on payment of costs and entering a common appearance, if the case is one in which the defendant could not have been held to bail under the 1 & 2 Vict. c. 110. *Boddington v. De Melfont*, 671

(2). *Right of Outlaw to recover Damages*.

An outlaw cannot enforce payment of damages recovered in an action of libel by scire facias on the recognisance to the Crown, under the 60 Geo. 3, c. 9, s. 8, and 11 Geo. 4 & 1 Will. 4, c. 73, s. 3; and therefore, where notice of a rule to stay proceedings on the ground of his outlawry was served on the Attorney-General and he did not appear, the Court made the rule absolute. *Regina v. Lowe*, 697

OVERSEER.

See MUNICIPAL CORPORATION ACT.

Bond given by Assistant Overseer.

In 1841, T. R. was, by a resolution of the vestry, appointed permanent assistant overseer to the parish of W. F., at an annual salary of 16*l.*, and he performed the duties without giving security. In May, 1846, it was resolved by the vestry, that he should continue his office upon giving

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security; and accordingly, in June, 1846, a bond was entered into by T. R. with two sureties in pursuance of the 59 Geo. 3, c. 12, subject to the condition that the said T. R. should, from time to time, and at all times thereafter during the continuance of his said appointment, faithfully account for the collection of the rates, &c., and duly execute all the duties of the office; and a few days afterwards a warrant of the appointment of T. R. as assistant overseer was executed by the magistrates. T. R. continued to perform the duties of assistant overseer till 1851, but the duties having become lessened, in consequence, amongst other things, of the appointment of a relieving officer in that year, a vestry (amongst whom was one of the sureties to the bond), with the consent of T. R., came to the resolution, that T. R. should continue the office at a salary of 14*l*. per annum. After this, T. R. continued to discharge the duties of the office for some months, and then resigned it, when he was found in debt to the parish:—*Held*, that the resolution of the vestry of 1851 did not amount to a revocation of the original appointment of T. R., but that he continued in the office at a reduced salary, and consequently that the sureties were not discharged from liability under the bond. *Frank, App.; Edwards, Resp.*, 214

PARISH.

See BURIAL FEES.

PARISH REGISTER.

See MONEY HAD AND RECEIVED.

PARTICULARS OF OBJECTION.

See PATENT.

PARTICULARS OF SET-OFF.

See SET-OFF.

PARTIES TO ACTION.

See HUSBAND AND WIFE, (1).

PARTNERS.

See SOCIETY FOR THE PROTECTION OF TRADE

PARTNERSHIP DEED.

The plaintiff entered into an arrangement with A. and B., who carried on business in co-partnership together, to join the firm upon their obtaining for him some security as to the state of the firm. Accordingly, by a deed of co-partnership, the defendant, who was the father of one of the partners in the old firm, covenanted with the plaintiff that the debts then owing to A. and B. would realise to A., B., and the plaintiff in the whole 99*l*. 19*s*., being the amount at which the same were valued; and that if the same should not realise the said sum, the defendant would, on demand of the plaintiff, pay the deficiency thereof to A., B., and the plaintiff; and also, that the debts then owing by A. and B. did not exceed 1195*l*. 12*s*., at which sum they had been valued; and that if they should exceed that sum, the defendant would, on demand of the plaintiff, out of his own private funds, pay to A., B., and the plaintiff, or the person to whom the same might be due, the sum which the last-mentioned debts might exceed the last-mentioned sum. At the time of the execution of the deed the firm was in insolvent circumstances, and shortly afterwards A. and B. were declared bankrupt. It appeared that the debts of the firm exceeded the valued amount of

1195*l.* 12*s.* by 1000*l.*; but it also appeared that less than the sum of 1195*l.* 12*s.* had been paid on account of the liabilities of the old firm:—*Held*, that the defendant's covenant was a contract of indemnity only; but that the plaintiff was entitled to recover as damages the actual loss which he had sustained by reason of the defendant's breach of covenant, and that the amount of such damage was purely a question for the jury. *Walker v. Broadhurst*, 889

PATENT.

See COMMON LAW PROCEDURE ACT, (9).
PLEADING II., (3).

Particulars of Objection.

Where, in an action for the infringement of a patent, the defendant relies on a general user of the supposed invention, it is sufficient to state, in his particulars of objection, under the 15 & 16 Vict. c. 83, s. 41, that the invention was used by manufacturers generally at a particular place, without naming any person or specifying any manufactory. *Palmer v. Wagstaffe*, 840

PAWNBROKER.

A pawnbroker complies with the requisites of the Pawnbrokers Act, 39 & 40 Geo. 3, c. 99, s. 6, by inserting in the note or memorandum he delivers to the pawnor, a statement of the matters specified in that section, upon the information he receives from the pawnor, although such information be false, provided the insertion be made bonâ fide and in ignorance of its falseness. *Attenborough v. London*, 661

PAYMENT.

See BOND.

LOAN SOCIETY.

MONEY HAD AND RECEIVED.

PAYMENT OF MONEY INTO COURT.

See PLEADING II., (2).

PERSONALTY.

See LEGACY DUTY, (4).

PETITION.

See BANKRUPT, (3), (7).
INSOLVENT.

PIRACY.

See INSURANCE, (5).

PLEADING.

See BANKRUPT, (6).

BILL OF EXCHANGE, (1).

COMMON LAW PROCEDURE ACT,
(4), (5), (7), (9).

FREIGHT.

INFANCY.

INSOLVENT, (1).

INSURANCE, (1), (2), (6).

JOINT-STOCK COMPANY, (2).

LANDLORD AND TENANT, (2).

LOCAL ACTION.

MUNICIPAL CORPORATION ACT.

PUBLIC HEALTH ACT.

SET-OFF.

I. DECLARATION.

Absence of Consideration.

A declaration stated, that the plaintiff sued the defendants as executors of J. C.; that J. C., being seised in fee of certain messuages and premises, by an agreement dated &c., agreed with the plaintiff as follows:—"Memorandum of agreement made on &c. between J. C., of the one part, and J. F. (the plaintiff), of the other. The said J. C. agrees to let, and the said J. F. (the plaintiff) agrees to take, all that (describing the premises, to hold unto the said J. F. (the plaintiff), from &c., for the term of

two years, at the yearly rent of &c. ; and in consideration thereof, and provided the said J. F. (the plaintiff) shall pay the rent and observe the agreements and stipulations hereinbefore contained on his part, the said J. C. for himself &c., agrees with the said J. F. (the plaintiff), that he the said J. C., his heirs, &c. will grant unto the said J. F. (the plaintiff), a lease of all the premises for the term of twenty-one years, at a clear yearly rent, to be fixed according to a valuation to be made in the usual way, which lease shall contain all the covenants &c. contained in the draft of a lease (now produced). And the said J. F. (the plaintiff) agrees with the said J. C. to accept the said lease, and to execute a counterpart thereof &c. To all which both parties agree. Witness J. W. (Signed) J. C." The declaration contained various averments of performance on the part of the plaintiff, and alleged, as a breach, that the defendants had not nominated a valuer, whereby no clear yearly rent of the said farm was fixed, and whereby no lease was ever executed to the plaintiff:—*Held*, that the declaration was bad in substance, in not stating any consideration for the alleged agreement on the part of J. C., the testator. *Fremlin v. Hamilton*, 308

mises as tenant at will to the defendant, at the yearly rent of 150*l.*, payable quarterly; for which rent it should be lawful for the defendant to distrain, as landlords may for rent reserved on leases for years; that Q. held the premises under the indenture and agreement; that rent for three years and a quarter, during all which time Q. held the premises under the indenture as such tenant, and the defendant was possessed of them as aforesaid, became due; whereupon the defendant distrained the goods for rent. The plaintiff demurred, after setting out on over the indenture, whereby, after reciting that the premises in question were demised by M. to Q. for twenty-one years wanting one day; and that the defendant had consented to lend Q. 400*l.*, on the same being secured as thereafter mentioned: it was witnessed, that Q. demised the premises by way of mortgage to the defendant, at a pepper-corn-rent, and it was further agreed, that Q. should hold the premises as tenant at will to the defendant, at the yearly rent of 150*l.*, with power of distress:—*Held*, that the plea was bad, for not alleging a seisin in fee in the defendant, or deducing a title so as to enable him to distrain the goods of the plaintiff, who neither was a party to the deed nor claimed under Q. *Pinhorn v. Souster*, 138

II. PLEA.

(1). *Statement of defective Title.*

Pleadings specially demurred to before the Common Law Procedure Act, 15 & 16 Vict. c. 76, came into operation, are not affected by its provisions.

To trespass de bonis asportatis, the defendant pleaded, that by indenture of the 29th July, 1847, it was agreed between Q. and the defendant, who then, and during all the time thereafter mentioned, was possessed of certain premises for a term unexpired therein, that Q. should hold the pre-

(2). *Plea in Detinue.*

To detinue of divers goods of the value of 500*l.*, as upon a bailment, to be re-delivered on request, the defendant pleaded, first, as to part, non detinet; secondly, as to the residue, that the plaintiff ought not further to maintain his action to recover them or their value, because, after the commencement of the suit, the defendant delivered them to the plaintiff, and the plaintiff accepted them from the

defendant; thirdly, as to the damages by reason of the detention of those goods, payment of 1s. into Court, and no damages ultra. On demurrer to the second and third pleas:—*Held*, first, that the second plea was good, inasmuch as, the goods having been delivered up, the plaintiff could have no judgment to recover them or their value, but only to recover damages for their detention.

Secondly, that the third plea was also good, since detinue is a personal action in which compensation or amends is sought to be recovered, though the goods or their value is also sought to be recovered, and therefore money might be paid into Court under the 3 & 4 Will. 4, c. 42, s. 21. *Crossfield v. Such*, 159

(3). *Evidence admissible under Plea of Want of Novelty, and not the true Inventor.*

In an action for the infringement of a patent, pleas which deny that the plaintiff was the true and first inventor, and that the manufacture was new, do not bind the plaintiff to the description of the invention as given in the specification, so as to preclude him from giving evidence to shew that the invention does not consist, as might be inferred from the specification, in the use of several new matters, but in the new combination of several old matters. *Bateman v. Gray*, 906

(3). *Reasonable Time.*

To an action for not delivering iron sold by the defendant to the plaintiff, under a contract "to be delivered as required," the defendant pleaded that the plaintiff did not, within a reasonable time, request the defendant to deliver the iron. Replication, that the plaintiff, so soon as the iron was required by him, re-

quested the defendant to deliver it. On demurrer to the replication:—*Held*, that the plea was bad, since the defendant was bound to inquire of the plaintiff whether he would have the iron, before he could rescind the contract, on the ground that he was not within a reasonable time required to deliver it. *Jones v. Gibbons*, 920

III. REPLICATION.

(1). *De Injuria.*

To an action of trespass for entering a close of the plaintiff's, and pulling down a stable, the defendant pleaded that he was possessed of a dwelling-house adjoining the plaintiff's close, and was entitled to have the light and air enter through a certain ancient window therein; that the stable wrongfully and unlawfully obstructed the light and air and darkened the window, wherefore he entered the plaintiff's close and pulled down the stable to remove the obstruction. To this plea the plaintiff replied *de injuria*:—*Held*, on special demurrer, that the replication was good, as the plea consisted merely of excuse; that it neither claimed any interest in the plaintiff's land, nor set up such a right by virtue of an authority from the plaintiff, within the true meaning of the rule which precludes the adoption of this general form of replication. *Thompson v. Eastwood*, 69

(2). *In Trespass.*

Trespass for assault. Plea, that the defendants, as the servants of W. and by his command, committed the trespass in defence of the possession and quiet enjoyment of his dwelling-house. New assignment, that the trespasses were committed out of and in a different place from the dwelling-house, to wit, in and upon a certain bridge in a certain farm, and in divers,

to wit, two yards, two fields, and two folds, of and in the same farm, and for another and different purpose. Plea to new assignment, that W. was possessed of the dwelling-house, and also of the bridge, yards, fields, and folds which belonged and were adjacent to the dwelling-house; and that the defendants committed the trespasses newly assigned in defence of the possession of the dwelling-house, bridge, yards, fields, and folds; and that they removed the plaintiff from them, and took him by the nearest and most direct way to a *certain public highway near to the dwelling-house, bridge, yards, fields, and folds*; and because they could not conveniently remove the plaintiff to such highway without passing over and across the said bridge, yards, fields, and folds, they, at the time in the new assignment mentioned, necessarily and unavoidably led him over them. Replication, that W. was seised of the farm, and demised it to J. as tenant from year to year; that J. entered, and, being indebted to B., assigned to him, amongst other things, all the growing and other crops which then were or might thereafter be found in and about the farm, as a security for the debt, with a power for B., in default of payment, to take possession; that B. made default; that the bridge, yards, fields, and folds, in the new assignment mentioned, and also a certain garden, were parcel of the farm demised to J.; that, at the time in the new assignment mentioned, W. was possessed of the garden and fields in which there were growing and other crops belonging to J.; that while J. was in possession, the plaintiff, as the servant of B., entered and took possession, and continued in possession, of the growing crops, until W. became possessed of the bridge, yards, fields, and folds, and of the garden; and that the plaintiff was removed

by the defendants from and off the bridge, &c., before a reasonable time had elapsed, and while the debt remained unpaid; and the defendants dragged the plaintiff from the dwelling-house along the bridge, and across the yards, fields, and folds, to the highway. On demurrer to the replication:—*Held*, in the Exchequer Chamber, first, that the plea to the new assignment was good, since it confessed and justified the trespasses therein alleged, namely, those committed on the bridge, yards, fields, and folds; and that the stating in the plea that the defendants removed the plaintiff to the highway, did not render that a part of the cause of action which it was necessary to justify, but was mere surplusage.

Secondly, that the replication was bad in substance, since it did not shew any right in B. to retain possession of the premises after J.'s tenancy had ended. *Hayling v. Okay*, 531

(3). *In Action on Foreign Judgment.*

To an action on a judgment recovered in Belgium in the year 1843, the defendant pleaded that he was not at any time resident or domiciled within the jurisdiction of the court wherein the judgment was recovered; nor was he a native of Belgium; and that he was not, at any time before the recovery of the said judgment, served with any process or summons; nor did he appear in the action; nor had he, at any time before the said recovery, any notice of or any means of defending himself from the said action. Replication, that the judgment was founded upon a bill of exchange, drawn in Belgium according to the laws in force in that country, and accepted by the defendant, payable at the house of one M. de W., at Bruges, in Belgium; and that, at the time of the acceptance, the defendant

resided in Belgium, at the said house, which was the defendant's last domicile and residence there; and that, by the law of Belgium, where a bill is accepted, payable at a particular place, such place may, for all purposes, and in all actions relating to such bill, be deemed the elected domicile of such acceptor; and further, that the summons by which the action was commenced was duly served upon the defendant at the above-mentioned house; and that, by the law of Belgium, such service is good and sufficient to give the court jurisdiction; and that the issuing of the process, the service of the summons, and the proceedings in the action were in accordance with the law of Belgium; and, according to such law, the judgment is valid and binding on the defendant:—*Held*, on demurrer, that the replication was bad, for not stating what the law of Belgium was at the time of the acceptance of the bill of exchange. *Meus v. Thellusson*, 638

POLICY OF INSURANCE.

See INSURANCE, (3), (4), (5).

POWER.

See MARRIAGE SETTLEMENT.

PRACTICE.

See COMMON LAW PROCEDURE ACT, (4), (5), (7), (9).

(1). *Rule to plead several Matters.*

A defendant obtained a Judge's order for leave to plead several matters, but at the time the order was obtained he was not enabled to draw up the rule, the Rule Office being then closed. He delivered the pleas, with notice that the rule would be drawn up and delivered as soon as it could be obtained. On the morning of the following day, the time for pleading having expired, the plain-

tiff signed judgment as for want of a plea:—*Held*, that the judgment was regular. *Glen v. Lewis*, 132

(2). *Entry of Case for Argument in Error.*

Under Reg. Gen., H. T., 16 Vict. r. 67, a cause may be entered for argument in the Exchequer Chamber four clear days before the first day appointed for hearing arguments, whether in Term or Vacation. *The South Eastern Railway Company v. The South Western Railway Company*, 367

(3). *Evidence in Answer to Defendant's Case.*

Upon the trial of an interpleader issue in a county court, for the purpose of trying the title to certain goods taken in execution, the plaintiff, in support of his title, gave in evidence a deed (which was valid upon the face of it) by which the execution debtor had assigned to him the goods in question; but the witness called to prove the execution of the deed was cross-examined by the defendants, with a view to shew that the transaction was fraudulent, and the deed was therefore void:—*Held*, that the plaintiff was not bound to give evidence in the first instance to establish the validity of the deed, although called upon by the Judge to do so, and although the nature of the defence appeared by the cross-examination of the attesting witness; and therefore, that the Judge was wrong in refusing to receive evidence in reply, to rebut a case of fraud set up by the defendants to invalidate the deed. *Shaw*, App.; *Beck*, Resp., 392

(4). *Change of Venue.*

Under the Reg. Gen. H. T., 1853, r. 18, in cases in which the venue might, under the previous practice, be changed on the common affidavit,

the application may now be made either before or after issue joined. If made before, the party applying should state all the circumstances on which he relies, as he will not be allowed to add to or amend his case. It will be sufficient, however, for him to rely on the common affidavit; but, in that case, he may be answered by affidavits on the other side. If the application be made after issue joined, the affidavits in support of it must shew that the issues joined may be more conveniently tried in the county to which it is proposed to change the venue. *De Rothschild v. Shilston*,

503

(5). *Discharge of Debtor on Terms.*

An action was brought upon a judgment of a county court, and the writ being specially indorsed under the provisions of the Common Law Procedure Act, judgment was signed under the 27th section. Prior to judgment being signed, the defendant was arrested under a Judge's order, under the 1 & 2 Vict. c. 110, and detained in custody. Subsequently to the signing of judgment, the Court of Queen's Bench decided that an action would not lie on a judgment of a county court; and the defendant thereupon applied to this Court to be allowed to plead to the action, and to be discharged out of custody. The Court refused to grant the application, except upon the condition that the defendant would either give bail or pay the amount of the debt and costs into Court. *Austin v. Mills*,

723

PREMIUM.

See INSURANCE, (2).
STAMP, (1).

PRESENTMENT.

See COMMISSION OF SEWERS.

PRESUMPTION.

See HUSBAND AND WIFE, (2).

PRISON.

See JUSTICE OF THE PEACE.

PROHIBITION.

See CONSISTORIAL COURT.
COUNTY COURT, (6).

PROMISSORY NOTE.

See INSOLVENT, (2).
LOAN SOCIETY.

Note given in blank.

In July, 1846, the defendant, having been arrested under a *ca. sa.*, in order to obtain his discharge gave to the attorney of the execution creditor 5*l.*, and a blank promissory note stamp with his name written on it. In May, 1851, the defendant obtained a certificate in bankruptcy; and in October, 1852, the attorney filled up the blank stamped paper, by making it a promissory note for 24*l.* 18*s.* 6*d.* at one month's date, and indorsed it to the plaintiff for value:—*Held*, first, that it was properly left to the jury to say whether the stamped paper was filled up within a reasonable time, considering the circumstances of the defendant and his ability to pay the note.

Secondly, that there was no claim proveable under the fiat, and, consequently, the certificate was no bar to an action on the note. *Temple v. Pullen*,
Mulhall v. Neville,

389

391, n.

PUBLIC HEALTH ACT.

The first count of a declaration stated that, by a deed between the plaintiff and the defendants, acting under the Public Health Act, 1848,

as the local board of health for the borough of S., the plaintiff contracted with the defendants that he would execute and complete all the works mentioned in the specification thereto annexed, in and about the constructing a sewer in the town of S., according to the specification and a plan prepared by a surveyor; the several portions of the works to be completed on or before the times mentioned in the specification, and to the satisfaction of the surveyor. And it was provided, that if the plaintiff should, from bankruptcy, insolvency, or any other cause whatever, be prevented or delayed in proceeding with the works, or should not proceed therein to the satisfaction of the surveyor, it should be lawful for the local board, after three days previous notice signed by their clerk, to be given to the plaintiff, of their intention so to do, to employ any other person to complete the works, and, at the expiration of the notice, the deed should, at the option of the local board, become void as to the plaintiff, and the amount *then already paid* to the plaintiff should be considered the full value of the works executed by the plaintiff up to that time, and no further claim should be made by the plaintiff for contract or additional works, and the materials at that time on the premises should become the property of the local board *without further payment* for the same. And it was provided, that one fourth of the whole amount should be paid when one third of the value of the works should have been certified by the surveyor to have been completed to his satisfaction, another fourth part when two thirds of the work should have been so certified, another fourth part on completion of the work so certified, and the remaining fourth part within two months from that time. Averments, that

the plaintiff in part executed the works, and was ready to complete them. Breach, that after the plaintiff had executed a part of the works, and before he had completed a third of their value, the defendants refused to permit him to complete the works. The second count was trover for the conversion of building materials. Pleas to the whole declaration: That no notice of action was given under the Public Health Act, 11 & 12 Vict. c. 63: to the first count, that, after the commencement of the works, the plaintiff did not proceed with the same according to the specification and to the satisfaction of the surveyor, whereupon the defendants, by a notice signed by the clerk to the local board and delivered to the plaintiff, gave notice of their intention to proceed with the works and employ other persons; that three days after the expiration of the delivery of the notice, the deed, at the option of the defendants, became void, and the defendants did proceed with the works and employ other persons, and that by reason of the premises they refused to permit the plaintiff to complete the works. There was a similar plea to the second count, justifying the conversion of the materials for the same causes. The plaintiff demurred to the two first pleas, and to the last replied, that before the converting of the materials the plaintiff had executed a portion of the works, and was ready to complete the residue, and that no payment whatever had been made on account of the part of the works so executed. To this replication the defendants demurred:—*Held*, First, that the declaration was good, since there was an implied contract on the part of the defendants to allow the plaintiff to complete the works, subject to the provision for determining the employment in the events mentioned.

Secondly. That no notice of action was necessary under the 11 & 12 Vict. c. 63, s. 139.

Thirdly. That the power of determining the employment might be exercised before any payment was made; and, therefore, the pleas to the first and second counts were good, and the replication to the latter plea bad. *Davies v. The Mayor, Aldermen, and Burgesses of the Borough of Swansea*,

808

QUANTUM MERUIT.

See RESCISSION OF CONTRACT.

QUIET ENJOYMENT.

See LANDLORD AND TENANT, (4).

RAILWAY COMPANY.

(1). *Personal Luggage.*

A carrier of passengers for hire is, at common law, only bound to carry their *personal* luggage; therefore, if a passenger has merchandise among his personal luggage, or so packed that the carrier has no notice that it is merchandise, he is not responsible for its loss. But if the merchandise is carried openly, or so packed that its nature is obvious, and the carrier does not object to it, he will be liable.

Under the 6th section of the 7 & 8 Vict. c. 85, which allows each passenger by a Parliamentary train to carry half a hundred weight of luggage, a husband and wife travelling together are entitled to carry one hundred weight.

The luggage of a passenger by railway, though never delivered to any servant of the Company, but kept by the passenger during the journey, is, nevertheless, in point of law, in the custody of the Company, so as to render them responsible for its loss. *The Great Northern Railway Company, App., v. Shepherd, Resp.* 30

(2). *Action when it lies against Company.*

The 7 & 8 Vict. c. lxxxv. "for making a railway from Colchester to Ipswich," empowered the Company to borrow money on mortgage. Section 49 enacted, "That the Company may, if they think proper, fix a period for the repayment of the money so borrowed, with the interest thereof; and in such case the Company shall cause such period to be inserted in the mortgage deed or bond; and upon the expiration of such period the principal sum, together with the arrears of interest thereon, 'shall be paid' to the party entitled to such mortgage or bond." By section 50, if no time was fixed in the mortgage deed for repayment, the mortgagee might, at the expiration of twelve months, demand payment of the principal and interest, upon giving six months previous notice; and the Company might at all times pay off the money borrowed upon giving the like notice. By section 51, if such interest remained unpaid for thirty days after it became due, and demand thereof made in writing, the mortgagee might either sue for the interest so in arrear by action of debt, or require the appointment of a receiver. By section 52, if such principal and interest were not paid within six months after the same became payable, and after demand thereof in writing, the mortgagee might sue for the same in any Court of law or equity, or, if his debt amounted to a certain sum, require the appointment of a receiver. The plaintiff lent to the defendants 1000*l.* upon the security of a debenture (in the form given in a schedule to the 7 & 8 Vict. c. lxxxv.), which provided that the principal was "*to be repaid on the 1st of January, 1851.*"

Held, in the Exchequer Chamber, affirming the judgment of the Court

of Exchequer—First, that where a corporation is created for certain purposes, with power to sue and be sued, to borrow money for the completion of those purposes, and to secure the repayment of such money by an instrument which on its face imports a covenant for repayment; if money be so borrowed and so secured, an action *primâ facie* may be maintained against the corporation on breach of the covenant.

Secondly, that in this case such right of action was not taken away or affected by the 7 & 8 Vict. c. lxxxv., since the 51st and 52nd sections of that Act did not give a right of action, but merely recognised it as already existing, and provided an additional remedy by the appointment of a receiver. *The Eastern Union Railway Company v. Hart*, 116

(3). *Shareholder.*

The defendant, by letter, requested the provisional committee to allot to him one hundred shares in a proposed Railway Company. In answer, he received the following letter:—"Sir, The provisional committee having allotted to you fifty shares of 20*l.* each in this undertaking, I am instructed to request that you will pay a deposit upon them of 1*l.* 10*s.* per share, on or before the 30th instant, to one of the following bankers," &c. "I beg also to inform you that scrip certificates for the above number of shares will be delivered to you in exchange for this letter and the banker's receipt for the deposit, after the execution of the parliamentary contract and subscribers' agreement, which will lie for your signature at this office on and after Monday the 30th instant." At the foot of the letter was the following memorandum:—"The shares allotted to you will be considered forfeited, if the deposit be not paid within the

period specified above, and the parliamentary contract and subscribers' agreement must be signed on or before the 20th of August, 1845." The defendant paid the deposit, but did not sign the parliamentary contract or subscribers' agreement. The Company was afterwards incorporated, and the defendant's name was placed on the sealed register of shareholders. In an action for calls:—*Held*, that the defendant was not a shareholder, and that the above circumstances were an answer to the *primâ facie* case arising from the production of the register containing the defendant's name. *The Waterford, Wexford, Wicklow and Dublin Railway Company v. Pidcock*, 279

(4). *Liability of Company as Carriers.*

The plaintiff delivered at a station of the South Staffordshire Railway Company certain goods, addressed "to the East India Docks, London," and paid one sum for their carriage the whole distance. By the practice of the South Staffordshire Railway, all goods delivered at that station for London are forwarded on their own line to Birmingham, and from thence by the London and North Western Railway. Before the goods in question arrived in London, the plaintiff directed a clerk at the London station of the latter Company to forward them to another place, which the clerk promised to do. The goods were however delivered according to the original address, and thereby lost:—*Held*, that the South Staffordshire Railway Company were responsible for the loss. *Scothorn v. The South Staffordshire Railway Company*, 341

(5). *Lease of Line.*

In 1846, the R. Railway Company

proposed to make a railway uniting the plaintiffs' and the defendants' lines and another railway. Part of the line proposed to be made ran so nearly in the same direction with part of a branch line proposed to be made by the plaintiffs, that it was proposed that the R. Company should, for that space, adopt the line to be made by the plaintiffs. The R. Company and the plaintiffs obtained Acts of Parliament in 1846, which came into operation on the same day. By section 44 of the R. Railway Company Act, 9 & 10 Vict. c. clxxi., after reciting that a bill was then pending in Parliament for enabling the plaintiffs' Company to make the portion of the line, and that it was thereby intended that the R. Railway Company should have the use of it for the purposes of their traffic, it was enacted, that, if the plaintiffs' Company did not complete the said portion of the line, the R. Railway Company might make it. And by section 50 of the same Act, the R. Railway Company were empowered to lease their railway to the defendants' Company for such term, and upon such conditions, as should be agreed upon between the said two Companies. By the plaintiffs' Company's Act, 9 & 10 Vict. c. clxxiii. s. 17, after reciting that a bill was then pending in Parliament for making the R. Railway, it was enacted, that, in case the said bill should pass into a law, the R. Railway Company might use the said portion of the line, and the stations, warehouses, works, and conveniences belonging thereto, subject to such reasonable terms as should be agreed upon between the plaintiffs' Company and the R. Railway Company. By the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, s. 113, which was incorporated into these special Acts, in cases where a railway is authorised

to lease its line or any portion of it, such lease shall entitle the lessees to enjoy all the powers and privileges granted to and enjoyed by their lessors. In 1847 an agreement was entered into between the R. Railway Company and the plaintiffs, to the effect that the R. Railway Company should have the right in perpetuity of using, for the purposes of their traffic, the above-mentioned portion of railway, upon certain specified terms. In 1850 the R. Railway Company leased their line, with all their powers, privileges, and all the benefit and advantage to be derived from the agreement of 1847, to the defendants for 1000 years, subject to the obligations and liabilities of the R. Railway Company:—*Held*, on error, that, by virtue of the special Acts of Parliament, the Railways Clauses Consolidation Act (7 & 8 Vict. c. 20), incorporated therewith, and the lease of 1850, the agreement of 1847 was binding upon the plaintiffs and defendants; and that the defendants were entitled, as against the plaintiffs, to stand, in respect of the agreement, in the situation of the R. Railway Company. *The London and South Western Railway Company v. The South Eastern Railway Company*, 584

(6). *Liability of Company under Parol Contract.*

The agent of an incorporated Railway Company agreed by parol with the plaintiff to purchase of him a quantity of railway sleepers upon certain terms. The sleepers were received and used by the company:—*Held*, that there was evidence from which the jury might find a contract by the company, the 97th section of the 8 & 9 Vict. c. 16, having provided that the directors may contract by parol on behalf of the company,

where private persons may make a valid parol contract. *Pauling v. The London and North Western Railway Company*, 867

REALTY.

See COUNTY COURT, (3).
LEGACY DUTY, (4).

REASONABLE TIME.

See PLEADING II., (3).

RECOGNISANCE.

See OUTLAWRY, (2).

RE-ENTRY.

See COVENANT, (2).

REGISTRATION ACT,
7 & 8 VICT. c. 110.

See JOINT STOCK COMPANY, (2).

REGULA GENERALIS, 429.

RELATION.

See ADMINISTRATOR, (1).
BANKRUPT, (6).

RENT.

See COUNTY COURT, (6).
DEED.
LANDLORD AND TENANT, (2).

RESCISSION OF CONTRACT.

The defendant, being about to erect seats for viewing a public funeral, entered into an agreement with the plaintiff, a foreign agent, to make the

scheme known abroad, and dispose of tickets for the seats. The plaintiff was to be paid for his work and expenses by a percentage on the tickets which he sold. After the plaintiff had incurred certain expenses, but before he sold any tickets, the defendant desired him not to dispose of them, as he would sell them himself. The plaintiff accordingly sent all applicants for tickets to him, and after the funeral delivered to the defendant a bill for work done and expenses incurred. The defendant paid the expenses, but refused to pay for the work:—*Held*, that it was a question for the jury, whether the original contract was not rescinded by mutual consent, and whether there was not a new implied contract that the plaintiff should be paid for the work actually done as upon a quantum meruit. *De Bernardy v. Harding*, 822

RIGHT TO BEGIN.

See STAMP DUTY.

RULE TO PLEAD SEVERAL MATTERS.

See PRACTICE, (1).

SALARY.

See OVERSEER.

SEAL.

See RAILWAY COMPANY, (6).

SET-OFF.

See COUNTY COURT, (5).
STATUTE OF SET-OFF.

Particulars of Set-off.

To a declaration on the common

counts, the defendant pleaded a set-off, and delivered particulars of his set-off with the plea. He afterwards withdrew this plea, and pleaded *puis darrein continuance* that there had been a controversy between the plaintiff and himself about other matters in addition to those in the cause, that a balance of accounts had been struck between the parties, that the plaintiff admitted the set-off pleaded to be due, and that it was agreed that the balance then struck should be paid by instalments, &c.; and that it was further agreed that the defendant should release the plaintiff from all liability on a certain contract, &c.; and that this agreement was accepted by the plaintiff in satisfaction of his cause of action. The plaintiff replied that he had been induced to enter into this agreement by fraud:—*Held*, that the particulars of set-off, delivered with the original plea of set-off, and in which particulars the statement of accounts differed from the statement upon which the agreement was founded, were admissible in evidence for the purpose of explaining the plea. *Buckmaster v. Meiklejohn*, 634

SHAREHOLDER.

See RAILWAY COMPANY, (3).

SHERIFF.

See BANKRUPT, (4).
TRESPASS.

SHIP.

See ADMIRALTY, (2).
CHARTERPARTY.

(1). *Bill of Lading.*

S., a partner in a firm at Liverpool,

and sole owner of the ship "Ellen," entered into an arrangement, by which the "Ellen" was, in 1850 and 1851, consigned, during several voyages, to H., a partner in the firm of H. & C. H., at New Orleans, with general instructions to do the best he could, either in loading the vessel on freight, or shipping cotton on the joint account of S. and H. On those occasions, as is usual when cotton is shipped on account of the shipowner, a nominal freight, or "no freight, being owner's property," was inserted in the bills of lading; but, in stating the partnership accounts in respect of the sale of the cotton, the current rate of freight was charged in favour of S., and to the debit of the joint adventure. On the 4th of April, 1851, S. wrote to H. in these terms:—"We hope you have bought cotton, and that the 'Ellen' has arrived. What you do, we will confirm." Again, on the 26th of April:—"Whatever you do for the 'Ellen' will be confirmed by us." On the 8th of May, 1851, H. & C. H. shipped on board the "Ellen" 447 bales of cotton; and the master signed a bill of lading, by which the cotton was "to be delivered unto order or to assigns, he or they paying freight for the said cotton 1s. per bale, being owner's property, when draft against same is paid, say 3590*l.* 9*s.* 8*d.*, with primage and average accustomed." On the 15th of May, H. & C. H. again shipped 381 bales of cotton, and a similar bill of lading was signed by the master. The draft for 3590*l.* 9*s.* 8*d.*, dated 8th of May, 1851, was for the invoice price of the cotton, and was on the firm of which S. was a partner, and was purchased, on the day of its date, by the plaintiffs, merchants at New Orleans, who took, at the same time, from the shippers, an indorsement in blank of the first bill of lading, as a security for the due

payment of the draft. A bill of exchange, dated 15th of May, 1851, for 3169*l.* 19*s.* 3*d.*, was in like manner drawn for the price of the cotton in the second bill of lading; and that bill of exchange was also purchased by the plaintiffs, the second bill of lading being also indorsed to them. In both cases the cotton was purchased of third persons, and not of the plaintiffs. These bills, when due, were dishonoured by S., and taken up by the plaintiffs. On the 10th of May, 1851, S., being indebted to the defendants, assigned to them the "Ellen" by way of mortgage, with all her freight and earnings, with power of sale and authority to receive freight. The "Ellen" arrived at Liverpool on the 28th of July, 1851, when the defendants took possession of her and her cargo, and claimed from the plaintiffs, as indorsees of the bills of lading, payment of the current rate of freight. The plaintiffs tendered the amount of freight reserved by the bills of lading, which being refused, they paid the amount claimed, under protest, and brought this action for money received to their use:—*Held*, that the plaintiffs were entitled to recover, since the circumstances shewed a clear authority from S. to H. to ship the cotton upon the terms of the bills of lading; and although the second of those bills was signed after the mortgage, yet it did not invalidate the transaction as against the plaintiffs, who took the bills *bonâ fide* and without notice. *Brown v. North*, 1

(2). *Liability of Owner of General Ship.*

The owner of a general ship is subject to the same responsibility for loss or damage of goods as a common carrier. Therefore, where, by the terms of a bill of lading containing the usual exceptions, the owner un-

dertook absolutely to deliver goods shipped on board his vessel:—*Held*, that he was not excused by reason of the goods having been damaged by rats, notwithstanding he had kept cats on board, such damage not being within any of the exceptions in the bill of lading. *Laveroni v. Drury*, 166

(3). *Power of Master.*

The master of a vessel has no power to charge his owner by signing bills of lading for a greater quantity of goods than those on board. *Hubbersty v. Ward*, 330

(4). *Interest on Mortgage of Ship.*

The owner of a vessel mortgaged it as a security for a debt, with a proviso for redemption on payment of the principal monies, and interest at the rate of 10*l.* per cent., in six months. The principal not having been paid at that time:—*Held*, that interest continued payable at the rate of 10*l.* per cent. *Morgan v. Jones*, 620

(5). *Retention of Money by Ship Owner's Agent.*

The plaintiffs were owners of a ship, one of them being also a partner in the firm of H. & Co., who acted as the ship's husband. The defendant was a merchant and ship agent at Quebec, and had transactions in the way of trade with H. & Co. The ship proceeded to Quebec, with instructions from H. & Co. to the master to apply to the defendant to charter it from thence to England. At that time H. & Co. were indebted to the defendant. The defendant effected a charterparty, in which he made the freight payable to himself at Quebec, and having received the money, retained it in liquidation of the debt due to him from H. & Co. The voy-

age having been performed, and the freight earned:—*Held*, that the plaintiffs, as owners of the ship to which the freight was incident, were entitled to recover the amount from the defendant, either under a special count for wrongfully making it payable to himself, or as money had and received by him to the plaintiffs' use. *Walshe v. Provan*, 843

SOCIETY FOR THE PROTECTION OF TRADE.

By the rules of a society "for the protection of trade," the professed object of which was to watch the progress of measures through Parliament affecting the trade interests, and to protect its members from the practices of the fraudulent and dishonest, the committee had the appointment of the printer and stationer, to be elected from among the members of the society; and to the committee was to be referred the defraying of the expenses, and the applying and disposing of the monies of the society. And it was also provided by the rules, that the sum of 10*l.* should be left in the secretary's hands to meet the current expenses; but that all orders for the payment of money should be drawn by the secretary upon the treasurer at a committee meeting. The plaintiff was appointed printer and stationer to the society, and shortly afterwards paid his subscription. The defendants, who were members of the committee, passed the resolutions for the orders for printing and stationery which were supplied by the plaintiff:—*Held*, that the plaintiff was not precluded by the rules from suing the defendants, as the rules did not create a partnership between the members of the society; and that it was not to be inferred from the rules that the plaintiff looked to the fund, and not to the parties

who gave the orders. *Caldicott v. Griffiths*, 898

SPECIAL DAMAGE.

See DAMAGES.

SPECIAL DEMURRER.

See PLEADING II., (1).

SPECIAL JURY.

Costs of.

To an action of trespass, in which the declaration contained five counts, the defendant pleaded not guilty and not possessed, upon which issues were joined; the plaintiff obtained a rule for a special jury. The defendant, before the trial, withdrew his pleas to the two last counts, and suffered judgment by default upon them. The cause was tried by a special jury, and the plaintiff obtained a verdict upon the general issue, but the defendant on the plea of not possessed to the three first counts, and the damages were assessed at 40*s.* on the other counts. The Judge certified for a special jury:—*Held*, that the plaintiff was not entitled to the costs of the special jury. *Waters v. Howells*, 244

SPECIFICATION.

See PLEADING II., (3).

ST. ALBANS.

See JUSTICE OF THE PEACE.

STAMP.

- (1). *Bond securing Payment of Premiums.*

By a bond, A., B., and C. bound themselves, in the penal sum of 600*l.*, to a Joint-stock Company. This bond, after reciting that A. and B. had agreed to join with C., as his

house, and stable only. *Henning v. Burnet*, 187

WEIGHTS AND MEASURES.

The 6th section of the 4 & 5 Will. 4, c. 63, which abolishes the use for the future of certain weights and measures, and the 21st section, which enacts, that "any contract, bargain, or sale made by any such weights or measures shall be wholly null and void"—do not render void a contract entered into in the United Kingdom for the sale of goods to be weighed or measured by the weights and measures mentioned in the 6th section, unless such goods are also weighed or measured in this country. *Rosseter v. Cahlmann*, 361

WHARF.

See COUNTY COURT, (2).

WILL.

Construction.

A testator by his will (made A.D. 1826) devised as follows:—"I give and devise unto my wife Elizabeth the lands, &c., to hold the same unto her and her assigns for and dur-

ing her natural life, and, after her decease, I give and devise the same to my nephew S. J., his heirs and assigns, for ever; provided always and my will is, that in case it should happen that my said nephew shall depart this life before he shall have attained the age of twenty-one years, and if after he shall have attained such age of twenty-one years he shall die unmarried, or, having been married, without lawful issue, then I give the same unto my brothers T. J. and J. J. &c., and their heirs, for ever, as tenants in common."—*Held*, that the testator's nephew S. J. did not take an estate tail, but an estate in fee simple, in the lands, with an executory devise over to the testator's brothers in the event of S. J. dying under twenty-one, or after that age dying without leaving lawful issue at the time of his death. *Doe d. Johnson v. Johnson*, 81

WINDING-UP ACT.

See GUARANTEE.

WITNESS.

See EVIDENCE, (1), (2).

END OF VOL. VIII.

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